RECENT DEVELOPMENTS

WILLS—EXISTENCE OF SURVIVORSHIP CLAUSE—ANTILAPSE STATUTE STILL APPLIES—*Detzel v. Nieberding, 7 Ohio Misc. 262, 219 N.E.2d 327 (P. Ct. 1966)*—Testatrix bequeathed 5,000 dollars to her sister, legatee, "provided she be living at the time of my death."[1] Legatee predeceased testatrix leaving a daughter, plaintiff, as sole surviving issue. Plaintiff contended that the gift lapsed and that the Ohio antilapse statute[2] applied to the bequest so that she should receive the 5,000 dollars. The residuary legatees, three local charities, opposed the application of the statute on the grounds that the words of survivorship precluded its operation. In an action for declatory judgment, the Hamilton County probate court held that the antilapse statute applied to the bequest, because the words of survivorship were not sufficient evidence of an intent that the statute not be applied.[3]

The effect of the antilapse statue is to give a bequest made to a relative, who predeceases the testator, to that relative's issue[4] rather than allow the bequest to lapse and pass to the residuary beneficiary or, if there is no residuary clause, pass intestate. The purpose of the statute is to dispose of lapsed bequests in the manner the testator most likely would have intended had he considered the possibility of lapse.[5] Therefore, the statute is not applied where testator expresses an intent contrary to the statutory distribution of lapsed bequests. The issue in this case was whether the words of survivorship showed intent to defeat the operation of the statute.[6]

Ohio has not ruled on this precise issue,[7] although other jurisdictions

---

[1] Detzel v. Nieberding, 7 Ohio Misc. 262, 219 N.E.2d 327, 329 (P. Ct. 1966).

[2] Ohio Rev. Code Ann. § 2107.52 (Page 1964):

> When a devise of real or personal estate is made to a relative of a testator and such relative was dead at the time the will was made, or dies thereafter, leaving issue surviving the testator, such issue shall take the estate devised as the devisee would have done if he had survived the testator. If the testator devised a residuary estate or the entire estate after debts, other legacies and devises, general or specific, or an interest less than a fee or absolute ownership to such devisee and relatives of the testator and such devisee leaves no issue, the estate devised shall vest in such other devisees surviving the testator in such proportions as the testamentary share of each devisee in the devised property bears to the total of the shares of all the surviving devisees, unless a different disposition is made or required by the will.

[3] Detzel v. Nieberding, *supra* note 1, at 274, 219 N.E.2d at 336.

[4] Ohio Rev. Code Ann. § 2107.52 (Page 1964).

[5] Woolley v. Paxson, 46 Ohio St. 307, 24 N.E. 599 (1889).

[6] Bensing, "The Ohio Antilapse Statute," 28 Cin. L. Rev. 1 (1959). Robert C. Bensing discussed this issue and concluded:

> Where a testator makes a gift to a relative . . . [and] uses other words which indicate that the donee is to receive the gift only if he survives the testator, the statute obviously does not apply. *Supra* at 28.

[7] Ohio has had several cases dealing with a similar issue—the effect of words of survivorship on class gifts. Shumaker v. Pearson, 67 Ohio St. 330, 65 N.E. 1005 (1902);

have. For example, in *In re Parker's Estate*,[8] which involved a bequest to testator's sister "if she survives me," and "if she does not survive me to her husband," both the sister and her husband predeceased testator and the sister's chidren claimed the sister's share under the New York antilapse statute.[9] The court held the statute inapplicable because testator so intended.[10] The words of survivorship were held to be a condition to the bequest, which the legatee failed to meet. The testator intended that the bequest lapse if the condition was not met because an alternative bequest was made to the husband. The condition upon which the first bequest was based had not been met and failure of the alternative bequest did not revive the first. Therefore, the antilapse statute was inapplicable.

Numerous cases agree with *In re Parker's Estate*.[11] The consensus has been summarized as follows: "When the testator uses words of survivorship, indicating an intention that the legatee shall take the gift only if he outlives the testator, it is clear that the statute against lapses has no application."[12]

Woolley v. Paxson, *supra* note 5; Everhard v. Brown, 75 Ohio App. 451, 62 N.E.2d 901 (1945). Thatcher v. Trouslot, 52 Ohio App. 74, 3 N.E.2d 57 (1935); Gale v. Keyes, 45 Ohio App. 61, 186 N.E. 755 (1933). The issue in these cases is not the same as in the Detzel case. The former deal with the question of when a class is determined and whether the non-survivors' issue can take a part. Generally, Ohio courts hold the issue can. These cases do not deal with lapsed bequests. The issue in Detzel, however, involved a lapsed bequest and whether it should pass under the statute or the common law rule.

[8] 15 Misc. 2d 162, 181 N.Y.S.2d 711 (Surr. Ct. 1958).

[9] N. Y. Deced. Est. Law § 29:

> Whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of the testator, or to a brother or sister of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate.

[10] *In re* Parker's Estate *supra* note 8, at 164, 181 N.Y.S.2d at 713.

[11] Williams v. Williams, 152 Fla. 255, 9 S.2d 798 (1942); *In re* Barrett's Estate, 159 Fla. 901, 33 S.2d 159 (1958); *In re* Gerde's Estate, 245 Iowa 778, 62 N.W.2d 777 (1954); Wallace v. Diehl, 202 N.Y. 156, 95 N.E. 646 (1911); *In re* Fischer's Estate, 188 Misc. 654, 66 N.Y.S.2d 69 (Surr. Ct. 1946); *In re* Conay's Estate, 29 Misc. 2d 1095, 121 N.Y.S.2d 486 (Surr. Ct. 1953); *In re* Schaertl's Will, 207 Misc. 406, 138 N.Y.S.2d 814 (Surr. Ct. 1955); *In re* Moore's Will, 13 Misc. 2d 640, 177 N.Y.S.2d 367 (Surr. Ct. 1958); Kunkel v. Kunkel, 267 Pa. 163, 110 A. 73 (1920).

[12] Annot., 63 A.L.R.2d 1172, 1186 (1959)—This note is a supplement to an earlier note which said:

> Where the testator uses words of survivorship, indicating an intention that the legatee shall take the gift only if he outlives the testator, it is clear that the statute against lapses has no application. In such a case the condition attached to the gift fails immediately upon the death of the legatee, and there is nothing upon which the statute can operate. This result is so obvious as not to require citation of authority. Annot., 92 A.L.R. 846, 857 (1934).

Authority contrary to this rule is scarce. In *In re Jerge's Will*[13] the court held that a bequest made "if my son . . . survives me" did not lapse.[14] The court said that the words of survivorship were surplusage and that the testator's intent, gleaned from the rest of the will, was clearly that he wanted the children of his son to take the property the son would have received, if he had survived. Although this case has been limited to its facts,[15] the court's approach has more general application.

The *Detzel* case is similar to *In re Jerge's Will* in that both have ambiguities as to testator's intent. Examination of the will in *Detzel* reveals facts which indicate that testatrix did not use the words of survivorship to prevent operation of the antilapse statute. Five money bequests were made in Item 5 of the will, each qualified by the words, "provided he (she) be living at the time of my death." One such bequest was made "to my beloved sister-in-law."[16] If testatrix had inserted these words of survivorship in order to prevent the operation of the antilapse statute, there was no reason to use these words in the bequest to a sister-in-law. A sister-in-law is not a relative and, therefore, a bequest to a sister-in-law is never affected by the antilapse statute.[17] Thus, the argument that the words of survivorship were used to prevent operation of the antilapse statute appears untenable, and the words seem "more the mannerism of the draftsman than an expression of the intent of the testator."[18]

Another of these bequests was made to testatrix's brother. In Item 1 of the testatrix's codicil, she revoked that bequest "since . . . (he) predeceased me." The codicil made no other distribution of the revoked bequest and it, therefore, passed under the residual clause just as the money would have done had the bequest to the plaintiff mother lapsed. Again, if the reason testatrix imposed a condition of survivorship was to avoid operation of the antilapse statute, then testatrix did not have to revoke this bequest because it would have lapsed and passed to the residuary legatees.[19]

The above facts, although not conclusive, tend to indicate that testatrix did not mean the words of survivorship to have the result of avoiding the antilapse statute. On the other hand, the words of survivorship, when given their usual meaning, impose a condition to the bequest and that condition not having been met, the result is that the bequest fails and the antilapse statute cannot be applied.[20] Since in construing a will, all parts of the will

---

13 180 N.Y. Misc. 268, 40 N.Y.S.2d 743 (Surr. Ct. 1943).

14 *Id.* at 270, 40 N.Y.S.2d at 745.

15 *In re* Parker's Estate, *supra* note 8. "There may be cases where such text may be regarded as 'more the mannerism of the draftsman than an expression of the intent of the testator', and may be rejected as mere surplusage." *Id.* at 163, 181 N.Y.S.2d at 713. See also *In re* Conay's Estate, *supra* note 11.

16 Memorandum for Plaintiff, p. 5.

17 Schaefer v. Bernhardt, 76 Ohio St. 443, 81 N.E. 640 (1907).

18 *In re* Jerge's Will, *supra* note 13, at 269, 4 N.Y.S.2d at 745.

19 Memorandum for Plaintiff, p. 5.

20 There is a distinction between a bequest which fails and one which lapses.

must be construed together and given effect if possible,[21] an ambiguity exists between the facts above and the words of survivorship as to which indicates testatrix's true intent. The court in *In re Jerge's Will* had a similar problem to resolve and did so by reading the words of survivorship out of the will. The court in *Detzel* solved the same problem by a rule of construction, that whenever an ambiguity exists as to whether testator intended the antilapse statute to apply, the ambiguity will be resolved by presuming the operation of the statute.[22]

This presumption in favor of the operation of the statute in cases of ambiguity is based on the policy behind the antilapse statute as set out in *Woolley v. Paxson*.[23] The court in *Woolley* said that the statute was meant to remedy the harshness caused by the common law lapse rule which generally acted to defeat testator's real intent.[24] Testators make wills as if they take effect immediately and rarely consider the possibility that a bequest might lapse if the legatee predeceases testator. The court characterized the statute as a reflection of the probable intent of most testators, were they to consider the problem.[25] Therefore, the statute should be given a liberal construction so as to remedy the "mischief" it was devised to cure.

The *Detzel* decision reflects the policy stated in *Woolley* and advances a rule which maximizes the usefulness of the statute by preventing ambiguous bequests from lapsing. This same presumption was made in *Larwill v. Ewing*,[26] where the issue was whether the statute applied to a bequest in a will whose codicil said that the testator intended that those excluded from the will should not participate in his estate. Legatee in that case had issue who were not mentioned in the will or codicil and hence the testator's intent was unclear as to whether his codicil was meant to prevent operation of the statute. The court ruled that the statute would be applied to the will,[27] the presumption being that the statute would apply unless a contrary intent was clearly and unambiguously stated in the will.

The *Detzel* decision would be supported by prior case law had the court been content to limit the rule set down to ambiguities caused by words of survivorship conflicting with other evidence in the will. However, the opinion of the court is not limited to such cases. The court claims that the same presumption always applies to wills and that the only time words of survivorship can avoid the operation of the antilapse statute is when there is also an

---

The former are those bequests which, because a condition precedent is not met, never takes effect and is not a bequest at all. The latter has effect and is a valid bequest but a bequest for which there is no legatee, due to his death.

21 Townsend's Executors v. Townsend, 25 Ohio St. 477, 487 (1874).

22 Detzel v. Nieberding, *supra* note 1, at 266, 219 N.E.2d at 331.

23 Woolley v. Paxson, *supra* note 5.

24 *Id.* at 314, 24 N.E. at 601.

25 *Ibid.*

26 73 Ohio St. 177, 76 N.E. 503 (1905). See also *In re* Finche's Estate, 239 Iowa 1069, 32 N.W.2d 819 (1948); Henney v. Ertl, 7 N.J. Super. 401, 71 A.2d 546 (Ch. 1950), where the same presumption is made.

27 Larwill v. Ewing, 73 Ohio St. 177, 182, 76 N.E. 503, 504 (1905).

alternative bequest.[28] But, if, as the court claims,[29] a court's purpose in construing a will is to give effect to testator's intent, then certainly the statute will not apply when no alternative bequest is made, but the testator's intent is clear that it should not apply.[30]

The real problem created by *Detzel*, however, is the case where no evidence is available as to testator's intent concerning operation of the antilapse statute other than the words of survivorship. According to the *Detzel* rule the presumption is that the statute applies. But in such a case, the words of survivorship are unambiguous and are consistently held to impose a condition of survivorship.[31] To apply the presumption of the applicability of the statute to such a case would more often than not have the effect of defeating testator's intent. A testator's intent must be ascertained by giving the words used in the will their ordinary meaning.[32] The ordinary meaning of words of survivorship is the meaning given to these words by all the other courts that have ruled on the issue. Therefore, the presumption of the applicability of the statute should not be applied to such a case.

If *Detzel* really is a case of ambiguity, then the result of the case is correct and the rule of presumption is properly applied.[33] Nevertheless applying this same rule to all cases dealing with words of survivorship is contrary to the established rules of will construction.

TORTS—INJURY WITHOUT IMPACT DUE TO NEGLIGENTLY CAUSED FRIGHT COMPENSABLE—*Falzone v. Busch, 45 N.J. 559, 214 A.2d 121 (1965)*—The Supreme Court of New Jersey recently held that substantial physical injury sustained as a result of negligently caused fear of immediate personal injury is compensable notwithstanding the absence of impact.[1] Charles Falzone and his wife Mabel sued to recover for their injuries caused by the defendant's negligent driving. The complaint alleged that Charles was struck by the defendant's automobile as he stood in a field near the roadway. It

28 Detzel v. Nieberding, *supra* note 1, at 274, 219 N.E.2d at 336.

29 *Id.* at 265, 219 N.E.2d at 330.

30 For example, the statute should not apply where the will states, "this bequest passes only if legatee survives me and by this I mean that § 2107.52, Revised Code, should not apply under any circumstances," even though no alternative bequest is made.

31 *Supra* notes 11 and 12.

32 Findley v. City of Conneaut, 145 Ohio St. 480, 62 N.E.2d 318 (1945).

33 Larwill v. Ewing, *supra* note 27.

1 Falzone v. Busch, 45 N.J. 559, 214 A.2d 121 (1965). Several other states have allowed recovery where injuries have resulted from fright caused by negligent conduct where there was no impact and where the plaintiff was in the zone of danger at the time of the negligent act. Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959); Robb v. Pennsylvania R.R., — Del. —, 210 A.2d 709 (1965); Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 Atl. 540 (1930); Battalla v. State, 10 N.Y.2d 237, 219 N.Y.S.2d 34 (1961); Colla v. Mandella, 1 Wis. 2d 594, 85 N.W.2d 345 (1957).

further alleged that Mabel was sitting in her husband's car near the scene of the accident and that the defendant's car passed so close to her as to put her in fear of her own safety. Physical consequences followed, and she required medical treatment. The lower court granted the defendant's motion for summary judgment on the count alleging the wife's injuries, but the supreme court reversed.[2]

In so holding, the *Falzone* court disregarded the precedent of the state set by *Ward v. West Jersey & Seashore R.R.*,[3] which involved a driver trapped between railroad crossing gates which the defendant-railroad's servant had negligently lowered leaving the driver to face an approaching train. Fright was alleged as the cause of the driver's later paralysis although there was a complete absence of impact. The *Ward* court stated three reasons for denying recovery: (1) it could not be proven that the negligence was the proximate cause of the injury; (2) there existed no precedent for allowing such recovery; and (3) if such recovery were allowed, the result would be a flood of litigation. Another reason for denying recovery occasionally cited in other cases is the absence of foreseeability.[4] A close analysis will discredit these reasons and support the result of the instant case.

Looking first to proximate cause, it is not difficult to understand the unwillingness of the 1900 *Ward* court to conclude that physical injury could be the result of fright because convincing medical evidence was not available then. But, today, there can be little doubt that fright can and does cause physical injuries.[5] To an innocent plaintiff, the cost of an injury is the same whether it was produced by fright or by physical contact. While it is true that in practice it remains difficult to prove that fright is the proximate cause of physical injury, difficulty of proof should never be a reason for denying recovery. The New York Court of Appeals has said in *Woods v. Lancet* that "it is an inadmissible concept that uncertainty of proof can ever destroy a legal right."[6] The *Falzone* court rightly concluded that fright can be the proximate cause of injury.

To substantiate the conclusion that difficulty in proving proximate cause is not a valid reason for disallowing recovery, one has only to look to the

---

[2] *Ibid.*

[3] 65 N.J.L. 383, 47 Atl. 561 (1900).

[4] 2 Harper & James, Torts § 18.4 (1956).

[5] Smith, "Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli" 30 Va. L. Rev. 193 (1944); Smith and Solomon, "Traumatic Neuroses in Court" 30 Va. L. Rev. 87 (1943). See Gair, "Damages For Fear And Mental Pain" 41 B.U.L. Rev. 342, 343 (1961) which states:

> We now know that sudden fright may produce changes in the nervous system, that the nerve centers of the body are a part of the physical system, susceptible to lesions not only from direct external causes acting primarily on the mind, lesions are just as serious and disability-producing as a broken bone or a tearing of the flesh. We know that fear may detrimentally affect the action of the heart, the circulation of the blood, the temperature of the body, and the nervous system, with residual physical disability.

[6] 33 N.Y. 349, 102 N.E.2d 691 (1951).

slight impact cases. Many states, which prohibit recovery when there is no impact, allow recovery when there is a slight impact although such impact did not in any way cause the injury for which suit was brought.[7] The apparent reason for this requirement of at least a slight impact is to foreclose the possibility of false claims. However, as certain courts and commentators have recognized, the jury's task is no more difficult in cases of no impact than in cases of slight impact.[8] Because it would be extremely easy to fabricate a slight impact, there appears to be no logical distinction between slight impact and no impact cases.[9]

The argument frequently advanced that there is no precedent for allowing recovery where there is no impact, again, is not persuasive for denying recovery. In some areas of law such as property and trusts, stare decisis plays an extremely important role, but in changing fields such as constitutional law and torts, stare decisis should be relegated to a much lesser role.[10] Furthermore, precedent should never be blindly followed regardless of the area of the law involved.

---

7 Clark v. Choctawatchee Electric Co-op., 107 So.2d 609 (Fla., 1958) (electric shock); Kentucky Traction & Term. Co. v. Roman's Guardian, 232 Ky. 285, 23 S.W.2d 272 (1929) (trifling burn); Driscoll v. Gaffey, 207 Mass. 102, 92 N.E. 1010 (1910) (forcibly seated on floor); Homans v. Boston Elev. Ry., 180 Mass. 456, 62 N.E. 737 (1902) (slight blow); Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930) (inhalation of smoke); Kasey v. Suburban Gas Heat of Kennewick, Inc., 60 Wash. 2d 468, 374 P.2d 549 (1962) (trivial jolt).

8 The Supreme Court of New Hamshire has stated that:

> From the viewpoint of analogy, allowance for mental pain, and for injury to the mind and nerve as well as body, is given as items of damage in all cases of liability for personal injury where there is impact. It would seem practically as easy to pretend them and as difficult to disprove them in such cases as in cases where there is no impact and fright is the intervening agency of transmittal. When neuresthenia is claimed as a result of a bodily injury, the connection between the injury and the disease and the extent and severity of the disease are no less uncertain and subject to objective tests than when fright takes the place of bodily impact.

Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 334, 150 Atl. 540, 543 (1930). See also McNiece, "Physic Injury and Liability in New York." 24 St. John's L. Rev. 1, 30 (1949).

9 Mr. Justice Musmanno, dissenting in Bosley v. Andrews, 393 Pa. 161, 175, 142 A.2d 263, 270 (1958), pointedly refuted the argument that lack of impact should be an arbitrary barrier to recovery.

> Are our courts so naive, are they so gullible, are they so devoid of worldly knowledge, are they so childlike in their approach to realities that they can be deceived and hoodwinked by claims that have no factual, medical or legalistic basis? If they are, then all our proud boasts of the worthiness of our judicial system are empty and vapid indeed.

10 See Aigler, "Law Reform by Rejection of Stare Decisis" 5 Ariz. L. Rev. 155 (1964); Aigler, "Stare Decisis and Legal Education" 4 Ariz. L. Rev. 39 (1962); Keeton, "Creative Continuity in the Law of Torts" 75 Harv. L. Rev. 463 (1962); Comment, "A Practical Approach to Stare Decisis" 5 Ariz. L. Rev. 67 (1964).

> A precedent, in law, in order to be binding, should appeal to logic and a genuine sense of justice. What lends dignity to the law founded on precedent is that, if analyzed, the particularly cited case wields authority by the sheer force of its self-integrated honesty, integrity, and rationale. A precedent can not and should not, control, if its strength depends alone on the fact that it is old, but may crumble at the slightest probing touch of instinctive reason and natural justice.[11]

A third reason for which courts deny recovery in absence of impact is their fear of a "flood of litigation." This argument can be dismissed, as it was in *Falzone*, as completely unsupported and unsupportable.[12] Fear of an expanded court docket seems particularly inept as a reason for denying justice where a meritorious claim is stated.

The only ground upon which recovery without impact may be justly criticized is that of foreseeability because the defendant could only be expected to foresee consequences from fright to a person of average sensitivity where defendant's wrongful act was merely negligent and not willful and wanton.[13] A negligent defendant should not be responsible for the risk of hypersensitivity unless he knows or should have known of it from the facts in his possession at the time of the negligent act;[14] for unless a negligent defendant can foresee hypersensitivity, he has no basis on which to know that his acts might cause injury. Thus, it would seem unfair to hold him responsible for the consequences of that hypersensitivity. Further, the burden resulting from restricting the defendant's conduct so as not to cause injury from fright to a hypersensitive person outweighs the risk of causing such injury, because of the low probability of encountering a hypersensitive person. This latter concept has been incorporated into the definition of negligence, defined as the taking of unreasonable risks of causing damage.[15] Each time a person drives an automobile through a populated area, he takes a

---

[11] *Supra* note 9, at 183, 142 A.2d at 274. An early New York decision, Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896), which was very similar in result to the *Ward* case, has been severely criticized for relying on doubtful precedent. McNiece, *supra* note 8, at 25.

[12] McNiece, *supra* note 8, at 31, states: "The final straw to break the back of the 'flood of litigation' argument is the fact that the reported cases reveal that the volume of litigation has been heaviest in those states denying recovery due to the extensive exceptions always constructed by the courts of such states."

[13] 2 Harper & James, Torts § 18.4 (1956).

[14] Toelle, "The Urban Case," 27 Conn. B.J. 74, 81 (1953) states:

> One who intentionally causes emotional distress may to be sure take the risk that the other may have subnormal emotional resistance—at least where that vulnerability is of a regularly recurring kind like pregnancy. But the rule is stricter where the act is not intentional (in that sense) but only negligent. Here the actor takes the risk of idiosyncracy only if he knows or should have known of it from the facts of the specific case.

See also Restatement (Second), Torts § 313, comment b (1965).

[15] Prosser, Torts 148 (3d ed. 1964).

risk, however small, of driving too close to a hypersensitive person and thereby causing damage, but that risk is not an unreasonable one due to its low probability of ever materializing. As the conduct does not involve unreasonable risk, the driver cannot be said to be negligent as to that extrasensitive person.

Two noted authorities have observed that fright must be "very harrowing" before it presents a threat to persons of average mental composure.[16] They further observe that most people have survived without harm a great number of near automobile collisions.[17] It is arguable that the injury to Mrs. Falzone was not reasonably foreseeable, but, on the other hand, the near accident which threatened Mrs. Falzone may have been the type of thing which does not occur often and which would cause harm to the normal person. This question cannot be resolved from the short statement of facts given in the case. Furthermore, it is not apparent as to what degree the defendant in the instant case was negligent; slight negligence, a much more common occurrence, should be less blameworthy than gross negligence. Clearly a grossly negligent defendant should be held to a higher standard of liability and to a lesser requirement of foreseeability than a slightly negligent defendant. Were defendant's negligence so gross as to be classified as willful and wanton, he could be held to have taken the risk of hypersensitivity.

Another prerequisite to recovery cited in some states is that the plaintiff must have been situated in the zone of danger at the time of the negligent act.[18] Thus, New York puts a limitation on liability in that a plaintiff bystander may not recover;[19] that is, the plaintiff must allege that he was in the zone of danger to state a good cause of action. The *Falzone* court did not discuss the problem in terms of zone of danger, but it is likely that New Jersey would impose the same requirement in a bystander situation. Courts in different states discuss the matter of proximity of the plaintiff to the negligent act, in different terms, but the requirement appears to be exactly the same.[20]

Upon the facts of the instant case, it would be extremely difficult to predict the result Ohio courts would reach because numerous cases indicate

---

16 2 Harper & James, Torts § 18.4 (1956).

17 *Ibid.*

18 Cases cited note 1 *supra.*

19 Kalina v. General Hospital of City of Syracuse, 31 Misc. 2d 18, 220 N.Y.S.2d 733 (Sup. Ct. 1961).

20 The Supreme Court of Errors of Connecticut has stated that if it is reasonably foreseeable that plaintiff, as situated, would be likely to be injured, the court is justified in finding that plaintiff was within the zone of danger. Strazza v. McKittrick, *supra* note 1, at 718, 156 A.2d at 151. The Supreme Court of Wisconsin has discussed the problem in terms of the duty owed by defendant to plaintiff; the discussion seems to imply that a duty of care is owed to people in the field of peril. Colla v. Mandella, *supra* note 1, at 598, 85 N.W.2d at 347. It seems that any attempt to distinguish between reasonable foreseeability with respect to physical location, duty of care to those in the field of peril, and zone of danger would amount to nothing more than begging the question because courts use the terms interchangeably.

that the Ohio law in this area is dated and confusing. The earliest Ohio case dealing with similar facts was *Miller v. Baltimore & O. Southwestern R.R.*[21] which was decided in 1908 and seems to indicate that Ohio would deny recovery for consequences of fright where there was *no contemporaneous physical injury*. Although the *Miller* court did not discuss the case in terms of "impact," the contemporaneous physical injury requirement seems to include an impact greater than a slight touching plus a resulting contemporaneous injury. *Miller* employed the standard reasons for denying recovery used in *Ward* and *Mitchell*.[22] However, the 1930 decision of *Morton v. Stack*[23] appears to have invoked the slight impact rule to allow recovery although the court did not mention this theory; Prosser has cited this case as an example of the slight impact rule.[24] Recovery was allowed although there was a complete absence of contemporaneous physical injury.

In 1939, the Ohio Supreme Court, without mentioning *Morton*, apparently rejected the *Morton* rule in *Davis v. Cleveland Ry.*[25] The court arbitrarily denied recovery because there was an absence of contemporaneous physical injury although there was a slight impact; the court considered itself bound by precedent. A ray of hope emerged from the decision for Judge Zimmerman stated:

> Frankly, the writer of this opinion believes that the sounder and more logical rule is as stated in *Gulf, C. & S.F. Ry. v. Hayter*, . . . , as follows: "We conclude that where a physical injury results from fright or other mental shock, caused by the wrongful act or omission of another, the injured party is entitled to recover his damages, provided the act or omission is the proximate cause of the injury, and the injury ought in the light of all the circumstances, to have been forseen as a natural and probable consequence thereof."[26]

---

[21] 78 Ohio St. 309, 85 N.E. 499 (1908). There, one of the defendant's railroad cars rolled onto the plaintiff's property; there was no impact with the plaintiff's person, but fright caused permanent impairment of her health.

[22] The *Miller* case was criticized in Green, "Fright Cases," 27 Ill. L. Rev. 761, 765 (1933).

[23] 122 Ohio St. 115, 170 N.E. 869 (1930). The case involved a child plaintiff who was trapped for 15 or 20 minutes in a smoke-filled apartment building; he recovered a judgment for a convulsion suffered a year and a half later. Apparently, the inhalation of smoke satisfied the requirement of slight impact. As the defendant was the owner of the apartment building, an aspect of the landlord-tenant relationship may have played a role in this decision, but the court failed to mention it specifically.

[24] Prosser, Torts 350 (3d ed. 1962).

[25] 135 Ohio St. 401, 21 N.E.2d 169 (1939). There the plaintiff was caught in electrically operated folding streetcar doors, the edges encased in soft rubber pressing against the plaintiff, which would certainly satisfy the slight impact requirement. She suffered no physical injury at the time, but she later suffered a partial paralysis as a result of her fright.

[26] *Id.* at 405-06, 21 N.E.2d at 172. It is puzzling that the court did not look to the special duty owed by a common carrier to its passengers and find some theory upon which to grant the plaintiff relief.

Some relief came in 1941 when an Ohio court of appeals refused to apply the *Davis* rule to acts which are willful and wanton.[27] In that case, an insurance agent allegedly made a statement to plaintiff's decedent that she had cancer at the time she secured an insurance policy to cause her to surrender the policy, which statement caused her to die from shock of the information.[28] Recovery was denied because the petition failed to show that the insurance agent intended to injure the deceased.[29] The court stated that "[i]t is the settled law of this state that no liability exists for acts of negligence causing mere fright or shock, unaccompanied by contemporaneous physical injury even though subsequent illness results, where the negligent acts complained of, are neither willful nor malicious."[30] Further, in 1944 although the *Davis* requirement of contemporaneous physical injury was purportedly applied in *Wolfe v. A. & P. Tea Co.*,[31] Wolfe held that the jury should decide whether the injury requirement was satisfied where the plaintiff ate part of a worm with a canned peach and later became sick. In that case a jury verdict allowing recovery, reversed by the court of appeals, was reinstated by the Ohio Supreme Court.[32] Thus, although the *Davis* rule was still alive, it was weakened; at least this case was left to the jury. In a later Ohio Supreme Court case a dissent recognized the modern viewpoint,[33] but that, of course, did little to weaken the *Davis* rule.

The most recent Ohio case[34] involving a negligence action for injury from fright involved a lady who suffered a fatal heart attack when a gasoline truck exploded near her premises. The Ohio court of appeals denied recovery

---

27 Hillard v. Western & Southern Life Ins. Co., 68 Ohio App. 426, 34 N.E.2d 75 (1941).

28 *Id.* at 428, 34 N.E.2d at 76.

29 *Id.* at 432-33, 34 N.E.2d at 78.

30 *Id.* at 430, 34 N.E.2d at 77.

31 143 Ohio St. 643, 56 N.E.2d 230 (1944).

32 *Id.* at 648, 56 N.E.2d at 232.

33 In Bartow v. Smith, 149 Ohio St. 301, 317, 78 N.E.2d 735, 742 (1948), which was an action for assault by the use of obnoxious language, Judge Hart stated in dissent:

> At the present time, the courts in most American jurisdictions permit recovery for physical harm or injury caused by mental distress for which the defendant is wrongfully responsible, even though there is an absence of contemporaneous impact. There is in this country, however a sharp conflict of authority as to whether there may be a recovery where a physical injury or illness results from fright or mental shock caused by the negligent act of another, in the absence of physical impact or the commission of an independent tort. In many cases, representing a modern viewpoint, such a recovery is allowed.

Another ray of hope came from Lewis v. Woodland, 101 Ohio App. 442, 140 N.E.2d 322 (1955). The court said that if the actor's conduct is negligent and if the actor should recognize the unreasonable risk of bodily harm, the fact that the harm comes from the internal operation of fright will not protect the actor from liability. This statement is undoubtedly dictum because the act in question in that case was unquestionably willful. The plaintiff was injured from fright when the defendant placed a rubber lizard in her lap.

34 Barnett v. Sun Oil Co., 113 Ohio App. 449, 172 N.E.2d 734 (1964).

in the usual tenor for lack of contemporaneous physical injury, but its result was not out of accord with *Falzone* because it did not appear that the decedent was within the zone of danger when the negligent act occurred.[35]

The foregoing cases indicate that Ohio has not yet adopted the modern view as set forth in the *Falzone* case; possibly the reason is that the Ohio courts have not had the opportunity in recent years to rule on the issue. As the Ohio law now stands, it seems that recovery for consequences of fright will be denied unless there is contemporaneous physical injury accompanying it; however, it may be a jury question whether the injury requirement is fulfilled. It is suggested that the courts of Ohio adopt the view that if a plaintiff suffers substantial physical injury as a proximate result of fright negligently caused by the defendant and occurring while plaintiff was in the zone of danger, and if the defendant could have reasonably foreseen that his conduct would expose a person of normal sensitivity to unreasonable risk of bodily harm through fright, then the defendant is liable notwithstanding the absence of impact or contemporaneous physical injury or both.

FEDERAL CIVIL PROCEDURE—REMAND FOR TRIAL—APPLICATION OF FINALITY DOCTRINE—*Mills v. Alabama, 384 U.S. 214 (1966)*—Petitioner, a newspaper editor, was charged with a violation of the Alabama Corrupt Practices Act[1] for publishing an editorial on election day urging the citizens of Birmingham to vote for a particular form of city government. The Alabama statute prohibited any electioneering or the solicitation of any votes on election day. The trial court sustained petitioner's demurrer, holding that the statute abridged freedom of press. The Alabama Supreme Court reversed and remanded,[2] holding that petitioner had indeed violated the statute and that the statute was "not an unreasonable limitation upon free speech."[3] Instead of submitting to a trial, petitioner admitted facts sufficient to constitute a violation of the act, and appealed this ruling to the United States Supreme Court which held that the state court judgment was final within the meaning of 28 U.S.C. section 1257[4] and that prohibition of editorial

[35] The policy behind denying recovery where a plaintiff is not in the zone of danger is that the defendant owes no duty to that type of plaintiff. Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935); see also 35 Colum. L. Rev. 463 (1935). See discussion in the text accompanying notes 13-16, *supra*.

[1] Ala. Code, 1940, Tit. 17, §§ 268-286. § 285 makes it a crime "to do any electioneering or to solicit any votes . . . in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held."

[2] State v. Mills, 278 Ala. 188, 176 So. 2d 884 (1965).

[3] *Id.* at 196, 176 So. 2d at 890.

[4] "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court. . . ." 28 U.S.C. § 1257 (1964).

publication on election day was an unconstitutional abridgement of freedom of speech and press.[5]

All Justices agreed that the Alabama Corrupt Practices Act infringed freedom of the press. There were divergent views, however, on the Supreme Court's jurisdiction to hear the appeal under the finality doctrine. Since the Alabama Supreme Court had merely reversed and remanded, the only effect was to overrule the demurrer and send the case back to the trial court for a jury trial of the issues. Petitioner claimed that the holding of the state supreme court was binding upon the trial court to the extent that they must convict him if he published the article, which he admitted he had done. The majority agreed with petitioner that since there were no more issues to be decided the judgment was final and could be appealed. The concurring opinion by Justice Douglas went one step further and reasoned that even if the judgment were not final it could still be reviewed under *Dombrowski v. Pfister*[6] since, in *Mills*, exercise of the first amendment rights of all newspaper editors in the state was being deterred by this state prosecution. Justice Harlan, in a lone dissent, felt that as long as there was a chance for acquittal of petitioner the judgment was not final.

The holding in *Mills* follows the trend of departure, first appearing in *Clark v. Willard*,[7] from the early cases which construed the finality requirement to restrict the Court's investigation to the face of the judgment.[8] In 1934 *Clark v. Willard* changed the "face of the judgment" rule by incorporating, by reference, the court's opinion into the judgment. The *Clark* case also spells out the test for finality. The Court must look at both the judgment and the opinion and see if there is anything more to be decided. If not, then the judgment is final since the trial court has no discretion but must follow the mandate of the higher court.

Richfield Oil Corp. v. State Bd.[9] and *Pope v. Atlantic Coast Line R.R.*[10] are cases emerging from the *Clark* test and, with *Mills*, form the present theory of finality. In *Richfield* the California Supreme Court had reversed, without directions, a judgment for the plaintiff. Under California law this had the effect of ordering a new trial. The United States Supreme Court held that there was no need for the plaintiff to go through the motions of a new trial since the state supreme court had ruled on all controlling issues, thus leaving "nothing more to be decided"[11] at the new trial. The *Pope* case is strikingly similar to *Mills*, and was the precedent upon which the majority in *Mills* justified Supreme Court review under the finality

---

[5] Mills v. Alabama, 384 U.S. 214 (1966).

[6] 380 U.S. 479 (1965).

[7] 292 U.S. 112 (1934).

[8] Hartford Acc. & Indem. Co. v. Bunn, 285 U.S. 169 (1932); Haseltine v. Central Bank, 183 U.S. 130 (1901); Bostwick v. Brinkerhoff, 106 U.S. 3 (1882); McComb v. Commissioners, 91 U.S. 1 (1875).

[9] 329 U.S. 69 (1946).

[10] 345 U.S. 379 (1953).

[11] Richfield Oil Corp. v. State Bd., *supra* note 9, at 73-4.

doctrine. Petitioner Pope was an employee of respondent and had been injured in a railway accident in Georgia. Although a resident of Georgia, Pope sued respondent in Alabama under the Federal Employers Liability Act. Respondent brought suit in Georgia to enjoin Pope from prosecuting his suit in an inconvenient forum. Petitioner demurred and his demurrer was sustained by the trial court but reversed by the Georgia Supeme Court. The petitioner argued that aside from arguments in favor of the demurrer which had been overruled, he had no further factual or legal issues to present to the court and thus the judgment should be regarded as final. The United States Supreme Court held that petitioner's federal claim had been fully and finally decided by the state courts and thus the Court could review the decision under section 1257.[12]

Since the only action that had been taken in the *Mills* case also involved a ruling on a demurrer, *Pope* and *Mills* can only be distinguished on one ground. *Pope* was an equity action before a judge who was bound to follow the mandate of the higher court while in *Mills* petitioner's case was a criminal action triable before a jury, and it is possible that the jury might have disregarded the trial judge's instructions and acquitted Mills.

In *Mills* the Court admittedly felt that the petitioner would be subjected to an unnecessary burden if he were forced to go through the motions of a trial once all of the issues in contention had been decided by the state supreme court. As Justice Black said in *Mills*, "Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a

---

12 Through the years several exceptions to the finality doctrine have been formulated, one of which has some bearing here. Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949) is the best example of the collateral order doctrine. In *Cohen* a federal district court denied a corporation's motion that, pursuant to a state statute, the plaintiff in a stockholder's derivative action be required to give security for reasonable expenses of defendants. The Supreme Court held that the decision was final under 28 U.S.C. § 1291 because "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* has relevance in this discussion due to Construction Laborers Union v. Curry, 371 U.S. 542 (1963), a case cited in all three opinions in *Mills*. *Curry* was decided on dual grounds, the Court saying that they could reach the same conclusion under either *Cohen* or *Pope*, *supra* note 10. In *Curry* there was a question of whether a suit to enjoin a labor union from picketing was under the jurisdiction of the Georgia state courts or the NLRB. The Georgia Supreme Court reversed the trial court, holding that it had erred in failing to grant the injunction. The United States Supreme Court held that even though the state supreme court had merely authorized the issuance of a temporary injunction, thus leaving a permanent order still to be issued by the trial court, its decision was final under § 1257 because not only was the injunction question wholly separable from and independent of the merits, but also there was nothing more to be decided under *Pope*. *Cf.* Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963).

completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets."[13]

It may indeed be true that the Court has saved petitioner from a waste of time in *Mills*, but on the other hand, as Justice Harlan pointed out in his dissent, the appellant's counsel had conceded at oral argument that a jury trial was still obtainable for Mills, and that it might result in an acquittal.[14] The real crux of the legal issues raised by the finality decision in *Mills* seems to be the weight which the Court will give to the probability of the petitioner suffering an adverse decision on retrial.

Harlan's dissent looked to the possibility of acquittal below as precluding court review, apparently on the thesis that the Court should conserve its energies and avoid interpretations of section 1257 which might strain the limits of permissable court jurisdiction[15] whenever a possibility existed which might render an issue available. The majority, however, apparently felt that the burden upon Mills of going to trial and the probability of the substantive issue again confronting the Court outweighed any advantages to be gained by postponing adjudication.

The Court, in apparently weighing the probability of an adverse decision to petitioner and the consequences thereof against present conservation of its energies seemingly extended *Pope* and *Constr. Laborers Union v. Curry*.[16] In those cases, which were civil cases, the trial judge was bound to follow the mandate of the state appellate court, so that in fact only ministerial acts remained for retrial. How far this limited extension of *Pope* and *Curry* will be carried, however, remains to be seen.

ACT OF STATE DOCTRINE—REQUIRES APPLICATION OF FEDERAL COMMON LAW—*Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966)*—On July 14, 1958 King Faisal II of Iraq was killed during a revolution that led to the establishment of a republic in Iraq. At that time the King had a balance of 55,925 dollars and 4,008 shares of a Canadian corporation deposited with the Irving Trust Company, a New York bank. On July 19, 1958 the new republican government of Iraq adopted an ordinance confiscating all property of the Iraqi royal dynasty on the grounds that it had been gained illegally. In August the United States recognized the Republic. In October of 1958 a New York court appointed the defendant, First National City Bank, administrator of the late King's New York assets. The Republic notified Irving Trust that it claimed the late King's assets on the basis of the July 19 ordinance. Irving Trust disregarded the claim and transferred the assets to First National City Bank

[13] Mills v. Alabama, *supra* note 5, at 217-18.

[14] *Id.* at 222, n.1.

[15] *Id.* at 222.

[16] 371 U.S. 542 (1963).

as administrator. In March of 1962 the Republic brought suit against the administrator bank in a New York federal district court to recover the bank balance and the proceeds from the sale of the shares. The district court dismissed the complaint[1] and the Republic appealed. The United States Court of Appeals for the Second Circuit affirmed the dismissal.[2]

The court of appeals held that under the act of state doctrine[3] announced by the Supreme Court of the United States in *Banco Nacional de*

---

[1] Republic of Iraq v. First Nat'l City Bank, 241 F. Supp. 567 (S.D.N.Y. 1965).

[2] Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

[3] The meanings assigned the term "act of state" are complex and varied. The Restatement of Foreign Relations Law defined the term as follows:

> § 41 Act of Foreign State: General Rule
>
> Except as otherwise provided by statute or the rules stated in §§ 42 and 43, a court in the United States, having jurisdiction under the rule stated in § 19 to determine a claim asserted against a person in the United States or with respect to a thing located there, or other interest localized there, will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests.

Restatement (Second), Foreign Relations Law of the United States § 41 (1965). The court in the present case, however, also uses "act of state" to describe a purported taking of property which is located within this country and outside the jurisdiction of the country purporting to act.

The rule stated in the Restatement is in many cases modified by a recent federal statute which provides:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: Provided, That this Subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

78 Stat. 1013 (1964), as amended, 22 U.S.C.A. § 2370(e)(2) (Supp. 1965). This statute does not apply to the present case because (1) the ordinance of July 19, 1958 was issued before January 1, 1959, (2) it was not contended that the taking violated international law, and (3) the compensation principle made a part of "international law" by the statute and set out elsewhere in the statute. 77 Stat. 386 (1963), as amended, 22 U.S.C.A. § 2370(e)(1) (Supp. 1965) protects only property owned by United States citizens or United States corporations.

Cuba v. Sabbatino,[4] the question of the respect to be given a foreign act of state was one of federal common law. The court further held that under federal common law our courts would ordinarily give no effect to a confiscatory act of a foreign state which purported to act upon property located outside of that country and within the United States. This note will examine that part of the court's opinion which held that the respect to be given to a foreign act of state was exclusively a question of federal common law.

Normally a federal court sitting in a diversity case applies the law of the state in which it sits,[5] including that state's conflict of laws rules.[6] In those instances in which modern federal common law exists, however, it displaces inconsistent state laws in both the state and federal courts.[7]

The application of federal common law in the present case raises two questions: (1) does *Sabbatino* require the application of federal common law in the present case, and (2) if *Sabbatino* does not so require, could the reasoning and underlying policy considerations of *Sabbatino* be extended to justify the application of federal common law in the present case? It is asserted that the answer to both these questions is no.

The court of appeals held that the answer to the first question was yes. The court said "The Supreme Court has declared that a question concerning the effect of an act of state 'must be treated exclusively as an aspect of federal law.' Banco Nacional de Cuba v. Sabbatino. . . ."[8] Consequently, the court of appeals did not consider the second question. The court did indicate, however, that it saw good reason for an extension of federal common law to the present case.

> [T]he exercise of discretion whether or not to respect a foreign act of state affecting property in the United States is closely tied to our foreign affairs, with consequent need for nationwide uniformity. . . . The required uniformity can be secured only by recognizing the expansive reach of the principle, announced by Mr. Justice Harlan in Sabbatino, that all questions relating to an act of state are questions of federal law, to be determined ultimately, if need be, by the Supreme Court of the United States.[9]

Consequently, the court of appeals refused to consider the application of a provision of the New York Decedents' Estate Law which provided that "the law of the state or country, of which the decedent was a resident, at the time of his death"[10] regulated the disposition of the decedent's personal property

---

[4] 376 U.S. 398 (1964).

[5] Erie R.R. v. Tompkins, 304 U.S. 64, 78-80 (1938).

[6] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

[7] Friendly, "In Praise of Erie—and of the New Federal Common Law," 39 N.Y.U.L. Rev. 383, 405-08 (1964).

[8] Republic of Iraq v. First Nat'l City Bank, *supra* note 2, at 50.

[9] *Id.* at 50-51.

[10] N.Y. Deced. Est. Law § 47. The provisions of the New York statute are quoted in the opinion of the court of appeals in Republic of Iraq v. First Nat'l City Bank, *supra* note 2, at 53.

in New York. The court rejected the argument that New York would apply the law of Iraq by asserting: "[W]e read Sabbatino to mean that New York could not, by application of its choice of law rules, give a foreign act of state an effect, whether less or greater, differing from that dictated by federal law."[11]

The court of appeals was not required to reach this conclusion by the decision of the Supreme Court in *Sabbatino*. Although the Supreme Court did hold in *Sabbatino* that the respect to be given the act of state in the case before it was a question of federal common law, it did not hold that all acts of state questions were questions of federal common law. Instead it expressly left open the possibility that some act of state questions were governed by state law.

In *Sabbatino* the Supreme Court was considering the respect to be given to the Cuban government's expropriation of sugar within its own territory. The lower federal courts had refused to give any respect to the confiscatory decrees because they considered the Cuban action to have been a violation of international law.[12] The Supreme Court reversed the lower courts, holding that, in order to avoid hindering the executive branch of the federal government in the conduct of foreign affairs, acts of state affecting property within the jurisdiction of the foreign state at the time of the act would be respected by American courts even though the acts violated international law.[13]

Before reaching this conclusion the Supreme Court examined the source of the act of state doctrine. It rejected both the theory of early Supreme Court cases that the doctrine was compelled by the nature of sovereign authority[14] and the theory that the doctrine was international law. The Court held instead that the doctrine was an aspect of the separation of powers[15]—a means of preventing judicial interference with the foreign policy of the executive branch. Since the doctrine could not successfully perform that function if it were merely state law subject to state changes, the Court held that the doctrine was federal law;[16] federal common law similar to a few other "enclaves of federal judge-made law which bind the states."[17] The Court said:

> [W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.[18]

---

[11] Republic of Iraq v. First Nat'l City Bank, *supra* note 2, at 53.

[12] Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375, 386 (S.D.N.Y. 1961) and 307 F.2d 845, 868-69 (2d Cir. 1962).

[13] *Supra* note 4, at 428.

[14] Oetjen v. Central Leather Co., 246 U.S. 297 (1918); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Underhill v. Hernandez, 168 U.S. 250 (1897).

[15] *Supra* note 4, at 423-24.

[16] *Id.* at 425-27.

[17] *Id.* at 426.

[18] *Id.* at 425.

This is the language quoted by the court of appeals in the present case.[19] The Supreme Court qualified this statement, however, with a footnote:

> At least this is true when the Court limits the scope of judicial inquiry. We need not now consider whether a state court might, in certain circumstances, adhere to a more restrictive view concerning the scope of examination of foreign acts than that required by this Court.[20]

In this footnote the Supreme Court recognized two facts. First, the Court recognized that an act of state problem would not always involve federal separation of powers considerations.[21] The problem could arise in other areas of law. Although *Sabbatino* certainly requires that federal law control when the problem arises in a federal separation of powers context, *Sabbatino* does not require[22] that federal law control when the problem arises in other contexts.[23] Second, the Court recognized that the rule it was adopting—a rule that merely required American courts to respect foreign acts of state under certain conditions despite international law objections—would be fully protected if federal common law merely required that much respect. The Court had no reason to require that the states give no more respect than that rule required.

The second question raised by the application of federal common law in the present case is whether the reasoning of *Sabbatino* can be extended to require such an application.

The Supreme Court applied federal common law in *Sabbatino* because it found a special federal interest which required protection.[24] Present day federal common law consists of a series of "enclaves"[25] each created because of a special federal interest.[26] Either a federal statute is involved[27] or the federal government itself is involved in the subject matter.[28] The only modern

---

19 Text accompaning note 8 *supra*.

20 *Supra* note 4, at 425 n.23.

21 *Id.* at 428.

22 See Levie, "Sequel to Sabbatino," 59 Am. J. Int'l L. 366, 368-69 (1965).

23 Furthermore, the Supreme Court did not decide in *Sabbatino* what law would determine the standards by which a foreign act would be reviewed if review was permitted or required. The court of appeals in the present case assumed that if whether a foreign act could be reviewed was a federal common law question, the standards by which it would be reviewed was also a federal common law question. That is only one of the possibilities. Section 2370 (discussed *supra* note 3) shows another possibility. It sets out a federal requirement for review in some cases but leaves the standards of review open in part, perhaps to be determined by the states.

24 *Supra* note 4, at 425.

25 *Id.* at 426.

26 See Friendly, *supra* note 7, at 408-11.

27 See, *e.g.*, Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) (Labor Management Relations Act); Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697 (1945) (Fair Labor Standards Act); Deitrick v. Greaney, 309 U.S. 190 (1940) (National Bank Act).

28 See, *e.g.*, Priebe & Sons, Inc. v. United States, 332 U.S. 407 (1947); National Metropolitan Bank v. United States, 323 U.S. 454 (1945); Clearfield Trust Co. v. United

federal common law cases which do not involve special federal interests are those concerning rights between the states.[29]

The question then is whether the application of federal common law in the present case serves such a special federal interest. The decision in the present case was based upon public policy grounds[30] and not upon federal interest,[31] but the court of appeals stated that there was a foreign policy interest in the uniformity of such decisions that required that such decisions be reached according to federal common law.[32] This uniformity theory differs from those in the Supreme Court cases cited by the court of appeals as supporting it. In *Sabbatino* a federal law was needed and uniform obedience to that federal law was therefore needed.[33] Similarly, in *United States v. Pink*[34] and *United States v. Belmont*[35] an executive agreement was held to be federal law and uniform obedience was therefore required.

There is an argument that can be made for a uniform law in act of state cases. The law will be confusing and complicated for both litigants and the courts if a particular act of state is accepted in one American state and rejected in another. This is, however, an argument that can be made about any area of American law. There is nothing to distinguish act of state cases from other cases in this respect. Act of state cases are not distinguished by the fact that they are far more likely to have foreign relations consequences, for those consequences are due to the results in particular cases and not to any contradictions between cases. If there is a federal interest in this area it is in controlling the results in certain cases.

In the absence of a special federal interest in uniformity in this area, the disadvantages of a piecemeal approach to uniformity through federal common

States, 318 U.S. 363 (1943); Royal Indem. Co. v. United States, 313 U.S. 289 (1941); Board of County Comm'rs v. United States, 308 U.S. 343 (1939).

[29] Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961) (escheat of undisbursed money paid for money orders); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) (apportionment of waters in an interstate stream).

[30] Republic of Iraq v. First Nat'l City Bank, *supra* note 2, at 51-52.

[31] It is clear that the decision in the present case did not protect any executive interest in having an act of Iraq respected since the decision was a refusal to respect an Iraqi act. It could be argued that the present decision protected an executive interest in keeping such acts from being respected, but that is a somewhat different interest from a need to prevent insults to nations with whom the executive is negotiating, and *Sabbatino* seems to hold that such an interest will not be protected by federal common law. The rule adopted in *Sabbatino* compels lower courts, in the circumstances described by the rule, to protect any possible interest in respect by always extending respect. It consequently compels them to ignore, in the circumstances described by the rule, the possibility of an executive interest in non-respect. Although it is upon this point that the *Sabbatino* rule is reversed by section 2370 (discussed *supra* note 3), that statute does not affect the present case.

[32] Text accompanying note 8 *supra*.

[33] *Supra* note 4, at 425.

[34] 315 U.S. 203 (1942).

[35] 301 U.S. 324 (1937).

law would seem to outweigh the advantage of simplicity which it offers. Two of these disadvantages are the displacement of state authority and the denial to both litigants and the courts of a developed and ascertainable body of law.

These disadvantages can be seen in the present case. Although the distribution of a decedent's estate has long been recognized as a state activity,[36] the court of appeals settled the problem central to the distribution of this estate as a question of federal public policy and not as a question of New York's decedent's estate laws.

Perhaps more important is the fact that state law may be displaced by a federal common law that has not yet been developed. This unborn law will be inadequate either to predict results or to reach them. Judge Friendly (the author of the opinion in the present case) has noted that the pre-Erie "general" federal common law had such inadequacies.[37] The present day American law of foreign relations is not well developed.[38] Consequently, in the present case the court of appeals could find less authority with which to decide the federal common law relating to the Iraqi ordinance than it could find to show that New York would not have given effect to the Iraqi ordinance if this case had been decided as a question of state law.

The application of federal common law in the present case was not required by either the decision in *Sabbatino* or by the reasoning that underlay that decision. *Sabbatino* decided only that federal common law controlled some act of state cases, not that it controlled all. The present case did not involve a special federal interest such as underlay the decision in *Sabbatino*. Therefore, the advantage of making act of state law uniform could be weighed against, and outweighed by, the disadvantages of adopting uniform law piecemeal.

---

36 See Markham v. Allen, 326 U.S. 490 (1946); Waterman v. Canal-Louisiana Bank and Trust Co., 215 U.S. 33 (1909).

37 "[R]eckonability was small. One trouble was that the body of federal 'general' law was so meagre." Friendly, *supra* note 7, at 406.

38 Henkin, "The Foreign Affairs Power of the Federal Courts: Sabbatino," 64 Colum. L. Rev. 805 (1964).

> Although the Law of American Foreign Relations is as old as, perhaps older than, the Constitution, it has not had the growth and attention enjoyed by other parts of the law. As a result, the cases are few; the Supreme Court does not build and refine steadily case by case; it develops no expertise or experts; the justices have no clear philosophies; the precedents are old and reflect the spirit of another day.

Id. at 831.

ATTORNEYS—APPOINTED REPRESENTATION OF INDIGENTS—RIGHT TO COMPENSATION—*State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966)*—In *State v. Rush*,[1] an attorney appointed by the Burlington County Court to defend an indigent charged with a non-capital offense sought recovery of his fees and expenses.[2] The court denied recovery and on appeal, the New Jersey Supreme Court held that an appointed attorney is entitled to both attorney's fees and expenses in any criminal prosecution. However, it pretermitted ordering the payment of fees for the purpose of giving the New Jersey legislature opportunity to determine how the obligation could best be met in similar future cases.

The court stated it is the exclusive responsibility of the judicial branch to determine the obligations of the legal profession, and it is part of this responsibility to determine whether an assigned attorney should be compensated. It found statutory support for this judicial power[3] and also implied it is provided in the New Jersey Constitution, which states the supreme court has jurisdiction over admission to the practice of law and discipline of persons admitted.[4]

The New Jersey Supreme Court recognized in recent years that the burden upon the bar has increased, and stipulated the state should help bear the burden by compensating assigned counsel in all criminal prosecutions. It argued the ultimate constitutional obligation to provide indigents with counsel rests with the state, not the bar, and it is only reasonable that the state share this burden with the bar. The court was faced with the problem of finding a source from which to pay this expense.[5] A New Jersey statute provides that the necessary expenses of a criminal prosecution are to be paid by the county.[6] The court reasoned the expense of providing counsel is a necessary expense, and accordingly within the statute.[7]

The reasoning in the *Rush* case may reappear in the future as there

---

1 46 N.J. 399, 217 A.2d 441 (1966).

2 N.J. Rev. Stat. § 2A:163-1 (1953) provides compensation only in capital cases.

3 State v. Rush, *supra* note 1, at 411-12, 217 A.2d at 447.

4 N.J. Const. art. VI, § II provides: "The Supreme Court shall have jurisdiction over the admission to the practice of law and discipline of persons admitted."

5 The majority view is that in the absence of statute providing for the payment of these allowances, an attorney who has been assigned by the court cannot recover compensation. Posey & Tompkins v. Mobile County, 50 Ala. 6 (1873); Case v. Shawnee County, 4 Kan. 441 (1868); Wayne County v. Waller, 90 Pa. 99 (1879); Pardee v. Salt Lake County, 39 Utah 482, 118 Pac. 122 (1911).

6 N.J. Rev. Stat. § 2A:158-7 (1953) provides: "All necessary expenses incurred by the prosecutor for each county in the detection, arrest, indictment and conviction of offenders against the laws shall . . . be paid by the county treasurer. . . ."

7 It has been held that general statutes having reference to the expense incidental to the arrest, trial, conviction, imprisonment, and support of persons of crime do not require the payment of compensation to attorneys appointed to defend indigents. Elam v. Johnson, 48 Ga. 348 (1873); State v. Simmons, 43 La. Ann. 991, 10 So. 382 (1891); Pardee v. Salt Lake County, 39 Utah 482, 118 Pac. 122 (1911); Presby v. Klickitat County, 5 Wash. 329, 31 Pac. 876 (1892). This is the majority position and accordingly the instant case adopts the minority view.

are other states which have statutes providing for compensation only in capital cases,[8] and a few states which have no statutory provision for compensating assigned counsel.[9] The courts in these states might be able to relieve their respective bars of the increasing burden by applying the *Rush* rationale. Compensation could be ordered in the absence of any express statutory provision,[10] and if the courts are able to find a statute which could be interpreted as including how the costs of compensation, once ordered, would be met, counsel will be paid.[11] If no such legislative will can be found, an order for compensation by the court certainly should precipitate the necessary legislation. If these legislatures refuse to enact a statute providing the means for payment, the courts have available the ultimate sanction of refusing to assign counsel, which could lead to wholesale dismissals of criminal prosecutions on the *Gideon v. Wainwright* principle.[12]

Even more significant would be the application of the *Rush* reasoning in those states where compensation provided by statute is token or inadequate,[13] and a supreme court feels the burden on the bar is too great. Ohio is a state where such reasoning could foreseeably be applied.[14] A recent survey in Ohio involving the defense of the poor recommended, "In regard to the question of fees for court-appointed counsel, it is suggested that the fees for trial of non-homicide felonies should be increased. . . . A statutory maximum of $300 for the trial of a serious felony which may take many days is most unjust."[15]

In Ohio, admission to the bar[16] and discipline of those admitted[17] is

[8] 1 Silverstein, Defense of the Poor in Criminal Cases in American State Courts 16 (1965). In four states an assigned attorney is paid only in capital cases.

[9] 1 Silverstein, *op. cit. supra* note 8, at 16. Six states and the District of Columbia do not compensate assigned counsel at all.

[10] This presupposes that these state supreme courts have the exclusive power to determine the bar's obligations. This power may be inherent, constitutional or statutory.

[11] See note 5 *supra*.

[12] Gideon v. Wainright, 372 U.S. 335 (1963). The state cannot prosecute indigent defendants for felonies unless they are provided with counsel. If the court refuses to assign an attorney, the indigent could claim his constitutional right of counsel, and the prosecution would inevitably fail. The attorney's obligation is owed to the court, not the state, and in the absence of a court order, he is free not to serve as counsel to the indigent. This seems to be the reasoning that *Rush* applied in an attempt to pressure the legislature into complying with the courts decision to compensate assigned counsel.

[13] 1 Silverstein, *op. cit. supra* note 8, at 32. Most states provide assigned attorneys with little or no payment, especially in non-capital cases.

[14] Ohio Rev. Code Ann. § 2941.51 (Page Supp. 1966) provides: "(A) In a case of murder in the first or second degree, and manslaughter in the first or second degree, such compensation and expenses as the trial court may approve. (B) In other cases of felony, such compensation as the trial court may approve, not exceeding three hundred dollars and expenses as the trial court may approve."

[15] 3 Silverstein, *op. cit. supra* note 8, at 606.

[16] The admission to the practice of law is determined by the Ohio Supreme Court as a result of its inherent power and by virtue of statute. Green v. Brown, 173 Ohio St. 114, 180 N.E.2d 157 (1962). Ohio Rev. Code Ann. § 4705.01 (Page 1954).

[17] The Ohio Supreme Court has inherent and statutory power relating to the

exclusively a judicial and not legislative power, and accordingly determined by the Ohio Supreme Court. If the supreme court is faced with the issue of deciding whether an assigned attorney should be forced, by reason of statute, to settle with the maximum three hundred dollars for his services, it could follow the *Rush* reasoning and hold the statute is merely "in aid of the final judicial responsibility and to extend no further than the prescription of minimum requirements, the judiciary remaining free to demand still more."[18] The judicial branch could accept such a statute in a "spirit of comity,"[19] or declare the statute void as an invasion of the court's inherent power, contending the legislature has no real power to determine whether an attorney is or is not compensated, or to set any guidelines for what payment he should receive.

The court in *Rush* found a New Jersey statute which it interpreted as providing for an attorney's expenses.[20] Ohio has a similar statute,[21] and the supreme court arguably could interpret that part of the statute which states the county, upon the order of the prosecuting attorney, shall provide for expenses "incurred by him in the performance of his official duties and in the furtherance of justice"[22] as including the expense of providing an indigent with counsel, without which a felony prosecution would halt and inevitably fail under *Gideon v. Wainwright*.[23] Such an expense is obviously incurred in the furtherance of justice. This statute is not satisfactory to meet all the future costs, but the Ohio Supreme Court, realizing this fact, could follow the New Jersey Supreme Court and pretermit ordering payment until the legislature has the opportunity to determine how the obligation could best be met.

The Bar has historically served the poor at its own expense, but attorneys are beginning to be adversely affected by the demands which the courts are increasingly making. Judges are aware of the injustices that an attorney

---

discipline of attorneys admitted to practice in Ohio, and may provide by rule the procedure for such discipline. Cleveland Bar Association v. Pleasant, 167 Ohio St. 325, 148 N.E.2d 493 (1958). Ohio Rev. Code Ann. § 4705.02 (Page 1954).

18 State v. Rush, *supra* note 1, at 410, 217 A.2d at 447.

19 *Ibid.*

20 See statute cited note 6 *supra.*

21 Ohio Rev. Code Ann. § 325.12 (Page 1953) provides: "There shall be allowed annually to the prosecuting attorney, in addition to his salary and to the allowance provided for by section 309.06 of the Revised Code, an amount equal to one half of the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice. Upon the order of the prosecuting attorney, the county auditor shall draw his warrant on the county treasurer, payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided by this section to be paid out of the general fund of the county."

22 *Ibid.*

23 372 U.S. 335 (1963). See note 12 *supra.*

may face,[24] and many seek a solution which would put the burden where they believe it properly belongs—on the state. The *Rush* case illustrates how a court may initiate this change. However, in the final analysis, the legislature's cooperation is necessary in seeking means to relieve the Bar of its burden, for only the legislature can establish and administer an efficient system of defending the poor.

TORTS—PRODUCTS LIABILITY—IMPLIED WARRANTY OF MERCHANTABILITY —RUNS TO WORKER INJURED BY DEFECTIVE JOIST—*Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966)*—Plaintiff, a structural ironworker, was employed by a subcontractor in the construction of a warehouse. Defendant manufactured certain steel joists and sold them to the general contractor. In 1960 a number of the joists, which had been installed overhead, collapsed and fell on the plaintiff injuring him. Initially a demurrer to plaintiff's petition alleging breach of implied warranty of merchantability was sustained. However, the court of appeals reversed and remanded holding that the petition stated a cause of action in tort for breach of warranty.[1] The Supreme Court of Ohio affirmed,[2] holding that when a manufacturer sells a product it implies that the product is of good and merchantable quality and safe for its intended use, that this is a duty imposed by law apart from any contract of sale, and when the duty is breached, as when the product contains a defect which renders it dangerous when applied to its intended use, and injury results, the injured party may sue in tort for breach of implied warranty. However, the court did emphasize that this is not absolute liability because the plaintiff must prove to the jury's satisfaction that (1) the product was defective, (2) the product was defective at the time of sale by the manufacturer, (3) the defect directly and proximately caused the plaintiff's injury, and (4) the plaintiff's presence could reasonably be anticipated. Furthermore, the defendant may offer evidence to rebut each of these elements as well as use the defenses of assumption of risk and intervening cause.[3]

In reaching this decision, the court stated[4] that the controlling principles of law were established by *Rogers v. Toni Home Permanent Co.*[5] and *Inglis v. American Motors Corp.*[6] In each of these cases the purchaser re-

[24] 1 Silverstein, *op. cit. supra* note 8 at 33, which states: "The majority of judges, prosecutors, and defense lawyers in virtually every state using an assigned counsel system believes that lawyers should be paid a reasonable amount for their services."

[1] Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 N.E.2d 92 (1965).

[2] Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

[3] *Id.* at 237, 218 N.E.2d at 192-93.

[4] *Id.* at 235, 218 N.E.2d at 191.

[5] 167 Ohio St. 244, 147 N.E.2d 612 (1958).

[6] 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965).

lied upon the manufacturer's representations in its national advertising regarding the quality and merit of the product. More specifically the court held in *Rogers* that an ultimate consumer injured because of a defect in the product could maintain an action for damages against the manufacturer without any direct contractual relationship between them. The *Inglis* case extended the tort action to allow similar recovery for property damages. However, since the *Lonzrick* case involved no representation by the defendant and no reliance by the plaintiff, the court's citation of *Rogers* and *Inglis* seems misplaced, and *Lonzrick* does in fact amount to the establishment of a separate tort in Ohio rather than the extension of a prior one.

This decision establishes in Ohio what is generally known as "strict liability,"[7] namely, special liability of a seller for the physical harm caused by a product in a defective condition when such defect makes the product unreasonably dangerous to the user or consumer or his property. Furthermore *Lonzrick* extends potential recovery to one who is not a consumer or user but merely a bystander whose presence can be reasonably anticipated by the manufacturer.

The court uses the term "defective" as synonymous with the concept of "unmerchantable" in the implied warranty field, *i.e.*, not fit for the ordinary use for which it is intended. This definition needs clarification because every unmerchantable product is not defective.[8] Other courts have allowed a defendant to defeat the plaintiff's case by showing that certain "defects" and dangers are natural to the product,[9] may be expected to be found in it,[10] or are unsafe by nature *and not liability producing so long as there is adequate warning*.[11] There also is no defect when the buyer is given what he demands, or when he uses the product abnormally.[12]

---

7 For discussions of strict liability, see Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965). Opponents of strict liability claim that implied warranty is something less than strict liability and assert that strict liability is hardly accepted by anyone, *e.g.*, Dalrymple, Brief Opposing Strict Liability in Tort, The Defense Research Institute, Inc. 5 (1966). Other sources indicate that the name of the tort is immaterial, *e.g.*, Prosser, "Assault Upon the Citadel (Strict Liability to the Consumer)," 69 Yale L.J. 1099, 1134 (1960); Restatement (Second), Torts § 402A, comment *m* at 355-56 (1965).

8 See Bennison v. Stillpass Transit Co., 5 Ohio St. 2d 122, 214 N.E.2d 213 (1966) where a tank containing vapor of an explosive nature was found not defective.

9 See Webster v. Blue Ship Tea Room, Inc., 347 Mass. 421, 198 N.E.2d 309 (1964) (fish bone found in fish chowder).

10 *Cf.*, Paolinelli v. Dainty Foods Manufacturers, Inc., 322 Ill. App. 586, 54 N.E.2d 759 (1944) (bone in noodle soup mix not "natural").

11 See Carmen v. Eli Lilly & Co., 109 Ind. App. 76, 32 N.E.2d 729 (1941) (plaintiff was informed of the risk).

12 See Davis v. Coats Co., 255 Iowa 13, 119 N.W.2d 198 (1963) finding it unforseeable that a tire changing machine would be used to inflate tire; Phillips v. Ogle Aluminum Furniture, Inc., 106 Cal. App. 2d 650, 235 P.2d 857 (Dist. Ct. App. 1951), held it was forseeable that a chair would be used to stand on.

Although the holding of *Lonzrick* is fairly clear, perhaps the most provocative aspect of the decision centers around why the Ohio Supreme Court decided to recognize a tort action for breach of implied warranty (or strict liability). The court's answer is that it was concerned with justice. It felt it was unfair to deny recovery to a person suffering injury from a defective product because of lack of a contractual relationship,[13] and that liability should not turn on whether plaintiff saw an advertisement, but on the creation of risk of harm to him.[14] The Ohio Uniform Sales Act extended warranties only to direct purchasers. While the Ohio Commercial Code, which became effective July 1, 1962, extended warranties to the members of the purchaser's household and guests,[15] it was of no help to Lonzrick because (1) he could not qualify under the extension of warranty, and (2) any rights and duties accrued under the Sales Act remained unaffected.[16] Thus, unless a change in the law was effected, Lonzrick, and others like him would have no remedy for their injuries.

Chief Justice Taft in dissent argues that there was no necessity for this new tort because the plaintiff could have brought a negligence action and invoked res ipsa loquitur to prove that the defendant was negligent.[17] However, res ipsa loquitur is of no help in situations where the product has been handled by parties other than the defendant, and plaintiff must not only prove defendant's negligence but must disprove causation by the other parties. Furthermore, in a negligence action defendant's proof of due care may defeat plaintiff's recovery;[18] under the *Lonzrick* rationale defendant's due care is not a defense.

A more sophisticated answer is "risk spreading" which is said to be the main reason for strict liability.[19] This argument maintains that those who suffer injury from defective products are unprepared to meet the consequences, whereas the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.[20] Opponents insist that risk spreading creates liability without fault which is contrary to our society's normal expectations, that it is a vehicle of socialization because the manufacturers and sellers are merely made collectors from the consumers and users, that the manufacturers and sellers will no longer have economic motivation to exercise due care in order to prevent liabilities, and that such a change of the law in the form of new public policy should be legislatively decided.[21]

---

13 6 Ohio St. 2d at 231, 237, 240, 218 N.E.2d at 189, 192, 194 (1966).

14 *Id.* at 237, 218 N.E.2d at 192.

15 Ohio Rev. Code Ann. § 1302.31 (Page 1962).

16 Ohio Rev. Code Ann. § 1301.15 (Page Supp. 1965).

17 6 Ohio St. 2d 227, 242, 218 N.E.2d 185, 195 (1966) (dissenting opinion).

18 Prosser, "Assault Upon the Citadel (Strict Liability to the Consumer)," 69 Yale L.J. 1099, 1116 (1960).

19 *Id.* at 1120.

20 See Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 441 (1944) (concurring opinion).

21 Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 248-50, 218 N.E.2d 185,

In order to answer this we must briefly look to the basis of tort law. While its objective is to determine whether to compensate and how, underlying the body of tort law is an awareness that the need for compensation is not a sufficient basis for an award, because compensation does not erase a loss, but only shifts it. Doing justice is the main objective, and it has long been assumed that this requires a wrongdoer to compensate his innocent victim, which, in turn, means shifting the loss from the one who has innocently suffered to another whose fault has caused the injury. However, the standard of fault has changed, especially through the use of an objective standard, and courts no longer adhere to a principle of basing awards on moral fault.[22] Rather there is a realization that a broader principle for awards should be invoked, that is, a principle of repair of injuries incurred rather than inflicted, where they arise in the course of carrying on an activity which has a probability of injury to others.[23] Manufacturers should not be asked to bear the loss simply because as a group they have greater wealth, but because as a group they have a greater capacity to bear responsibility for a loss and because it is fair to require that they bear a share of the loss caused by their activities.[24] Looking through the eyes of the innocent victim, can one say this is unjust? If the standard of fault has changed, and the courts now feel that the victim of defective products has a just cause, why should he not be allowed to recover?

As a general rule manufacturers' costs are ultimately paid by the consumer. Why some argue that the adoption of strict liability will decrease the manufacturers' efforts to use care in production is unclear. Where the manufacturer self-insures, he is directly affected by any liability claims. Where he uses commercial insurance, he is still subject to being rated, and bad risks are not particularly wanted in the insurance industry because it is well known that insurance rates must go up with an increased number of claims. In either event, it would seem that the manufacturer will still be concerned with producing better and safer products.

Whether strict liability should be adopted by judicial decision or legislative action is an issue upon which the court in *Lonzrick* strongly disagreed. Although the dissent found legislative intent not to invoke strict liability in Ohio,[25] the majority considered the policy changes created through judicial decisions[26] in *Rogers* and *Inglis* and seemed to conclude

199-200 (1966) (dissenting opinion); Lombardi v. California Packing Sales Co., 83 R.I. 51, 57, 112 A.2d 701, 704 (1955); Dalrymple, Brief Opposing Strict Liability in Tort, The Defense Research Institute, Inc. 16-17 (1966).

22 See Keeton and O'Donnell, Basic Protection for the Traffic Victim 242-50 (1965). Query: How else can courts hold an insane person responsible for his negligence?

23 See Pound, "The Problem of the Exploding Bottle," 40 B.U.L. Rev. 167, 185 (1960).

24 See note 22 *supra.*

25 6 Ohio St. at 250-52, 218 N.E.2d at 200-01 (1966).

26 *Id.* at 232-35, 218 N.E.2d at 189-91.

that development of products liability law was a proper subject for both the judiciary and the legislature.[27]

Since a major part of our law has evolved through judicial decisions, it clearly is untrue that lawmaking is strictly a legislative function. Some contemporary judges view it as a matter of individual decision whether to modify rules in the absence of legislative action, fill a legislative gap, further extend a principle or maintain existing law. Possibly it is unwise to judicially act when a legislature has recently debated and failed to enact a bill on the subject.[28] However, the absence of a safety law imposing punishment for the sale of defective products cannot be regarded as the Ohio legislature's intent to deny compensation to an innocent victim. Even when enacting public safety laws, the legislature has usually left civil actions to the courts.[29] In the torts field which has been overwhelmingly the result of judicial creation and elaboration it is natural for the court to develop the law and modify or abolish doctrines that have become incompatible with modern social facts and public policy. Besides it cannot be denied that many urgent law reforms are not tackled by legislatures because of low political priority.[30]

Little can be said beyond *Lonzrick* about the present status of Ohio's strict liability law. Absence of a reference to the Ohio Commercial Code may be some indication that the court plans strict liability to be an entirely independent action.[31] Alternatively, the court may insist that immediate purchasers proceed on warranties under the code and comply with code requirements, or may make a distinction between commercial transactions and situations involving ordinary purchasers unable to match the sellers' bargaining powers.[32]

The issues created by *Lonzrick,* but left unanswered, center around what plaintiffs will be included within the "persons whose presence can be reasonably anticipated" standard and whether strict products' liability will be extended to wholesalers, distributors or retailers.

---

27 *Id.* at 239, 218 N.E.2d at 194.

28 Friedman, "Legal Philosophy and Judicial Lawmaking," in Essays on Jurisprudence from the Columbia Law Review 101, 109-19 (1963).

29 While many safety laws, such as pure food and drug, and liquor control laws, provide penalties in case of violation, *e.g.*, Ohio Rev. Code Ann. §§ 3715.99, 4399.99 (Page 1965), they usually do not provide civil relief. Ohio Rev. Code § 4399.08 (Page 1965) merely states that a suit for damages shall be a civil action. In order to provide remedies for persons damaged because of violation of these safety laws, courts have had to hold that violation of the statute was negligence per se; see Schell v. DuBois, 94 Ohio St. 93, 103, 113 N.E. 664, 667 (1916) (interpreting a traffic ordinance).

30 See Friedman, note 28 *supra.*

31 The court may then be permitting a portion of the code relating to products liability to be displaced by case law rules of strict liability. See Shanker, "Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers," 17 W. Res. L. Rev. 5 (1965).

32 Seely v. White Motor Co., 63 Cal. 2d 9, 27, 403 P.2d 145, 158, 45 Cal. Rptr. 17, 30 (1965) (dissenting opinion).

Over the years the proponents of strict liability have concentrated upon the consumer.[33] Perhaps *Lonzrick* is another indication[34] that it is time to change this policy and recognize that all those whose injuries are proximately caused by defective products should also be compensated.

CONSTITUTIONAL LAW—CHRONIC ALCOHOLISM—CONVICTION—CRUEL AND UNUSUAL PUNISHMENT—*Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966)*—The Court of Appeals for the Fourth Circuit unanimously held the criminal conviction of chronic alcoholics for public intoxication to be a cruel and unusual punishment in violation of the eighth and fourteenth amendments.[1] The petitioner, Joe Driver, was arrested in North Carolina for public intoxication,[2] and because of his record of previous arrests, was sentenced to two years imprisonment. His appeal to the Supreme Court of North Carolina was unsuccessful, and after his petition in federal district court for a writ of habeas corpus was denied, the Court of Appeals unanimously reversed. It held when public intoxication becomes involuntary as the result of the disease of chronic alcoholism, to stamp such a person as criminal constitutes cruel and unusual punishment.

The court relied upon *Robinson v. California*,[3] which held punishment of a narcotics addict for being an addict is cruel and unusual punishment.[4] *Driver* used *Robinson* for two propositions, first, unwilled and ungovernable public appearances by the victim of a disease cannot be criminally punished, since the victim has no control over such appearances. The second, which in many ways is merely an extension of the first, is that in prohibiting a state from punishing a person for having a disease, *Robinson* necessarily prohibits punishment of the compulsive symptoms of the disease. In other words, if a state cannot punish a person for having a common cold,[5] then neither can

---

33 Prosser, "The Fall of the Citadel (Strict Liability to the Consumer)," 50 Minn. L. Rev. 791, 819-20 (1966); Restatement (Second), Torts § 402A, comment *o* at 356-57 (1965).

34 See Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965) where the court allowed a "bystander" (a boy hurt by a defective shell fired by his brother) to maintain an action for breach of implied warranty.

---

1 Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966).

2 N.C. Gen. Stat. § 14-335(12)(Supp. 1965) provides: "In Carteret, Craven, Durham . . . counties, by a fine, for the first offense, of not more than fifty dollars ($50.00), or imprisonment for not more than thirty days; for the second offense within a period of twelve months, by a fine of not more than one hundred dollars ($100.00), or imprisonment for not more than sixty days; and for the third offense within any twelve months' period such offense is declared a misdemeanor, punishable as a misdemeanor within the discretion of the court."

3 370 U.S. 660 (1962).

4 *Id.* at 667.

5 *Id.* at 667.

it punish him for sneezing in public. Implications of the case differ greatly, depending upon which of these rationales is stressed. It is true to a certain extent that the compulsive as symptomatic language tempers the involuntariness rationale, and how broadly or narrowly compulsive as symptomatic is defined will in many cases determine the result. The *Driver* opinion gave no clue as to how compulsive as symptomatic is to be interpreted, and in this respect each court will have to make an independent judgment.

Medical authorities have long contended that certain persons not legally insane under the *McNaghten* test[6] may nonetheless be unable to make free choices.[7] A good example are psychopaths,[8] or as they are now called, sociopaths. Under both *Driver*'s propositions, in many instances it would be cruel and unusual to punish such persons. It could be argued their flagrant violations of sexual conduct laws are acts both compulsive as symptomatic of their disease, and acts over which they have no control. Contrary to such a contention would be a pre-*Robinson* case, *Leland v. Oregon*,[9] which held sole use of the *McNaghten* test does not deny due process.[10] However, if *Driver* correctly relied upon *Robinson* as a basis for its conclusion that conduct must be willed and governable in order to be subject to penal sanctions, it would seem to provide a defense in this area. Likewise, to punish such persons for their behavior might be viewed as a punishment for a condition of mental abnormality over which they have no control.

If *Driver*'s proposition that the chronic alcoholic has a disease and does not drink voluntarily is accepted, as today's medical knowledge insists it should,[11] it could certainly be argued the chronic alcoholic drinks with as little volition as one who is forced to drink by another. The chronic alcoholic's intoxication might be analogized to involuntary intoxication, which relieves the criminality of acts committed under its influence.[12] In fact, the alcoholic would not have to be intoxicated in order for certain of his offenses to be excused from punishment. His craving for alcohol and involuntary and ungovernable need for it might excuse various offenses he might commit to satisfy his thirst. For example, an alcoholic who steals a bottle of wine from a store could argue he did not voluntarily take the wine—that his taking of it was an unwilled and ungovernable act because he no longer has any control over his need. The difficult question is whether or not such acts

---

6 See M'Naghten's Case, 10 Clark & Finnelly 200, 8 Eng. Rep. 718 (1843).

7 Examples are certain of the mentally ill such as sociopaths, children, and those of limited knowledge. Watson, "A Critique of the Legal Approach to Crime and Correction," 23 Law & Contemp. Prob. 611, 625 (1958).

8 *Id.* at 626. See also Karpman, The Sexual Offender And His Offenses 6 (1954).

9 343 U.S. 790 (1952).

10 *Id.* at 800-01.

11 See 2 Cecil & Loeb, A Textbook Of Medicine 1625 (10th ed. 1959); Guttmacher & Weihofen, Psychiatry And The Law 318-22 (1952); Jellinek, The Disease Concept Of Alcoholism 41-44 (1960).

12 See Bartholomew v. People, 104 Ill. 601 (1882); Saldiveri v. State, 217 Md. 412, 143 A.2d 70 (1958); Johnson v. Commonwealth, 135 Va. 524, 115 S.E. 673 (1923).

are compulsive as symptomatic of the disease. If emphasis is placed on *Driver*'s involuntariness rationale, and the standardless compulsive as symptomatic language is construed broadly enough, perhaps such an argument could be successfully presented.

In comparing various crimes connected with diseases such as alcoholism or drug addiction, it can be seen that some are more directly related than others to the disease. For example, although public intoxication may be caused by chronic alcoholism, it does not necessarily follow from it, as many chronic alcoholics do not become publicly intoxicated. The possession of narcotics, however, is definitely entailed by the addiction, for arguably a person cannot be a drug addict without at some time possessing narcotics. Thus, to punish a non-volitional addict for possession of narcotics seems to be a punishment for the disease itself much more directly than public intoxication statutes punish a chronic alcoholic for his disease. A court would not have to go as far as did *Driver* to say that to punish a non-volitional addict for possession is to punish him for the disease itself.

Robinson v. California held it was cruel and unusual to punish a person for having a disease, and *Driver* extended this prohibition to the involuntary symptoms of the disease. *Driver* seems to have reasoned that to punish a person for those acts which are products of a disease is in fact to punish him for the disease itself, and on the basis of *Robinson* this is unconstitutional. The cases in which the alcoholic's acts are products of his condition will have to be individually decided, and if this is taken as the relevant question, a *Durham* test[13] for insanity could be constitutionally required. The greatest bar in this area is the *Leland* decision, and whether or not *Leland* was repudiated by *Robinson's* reasoning is a question yet unanswered.

Although *Driver* achieves a laudable result in the instant case (if, of course, adequate treatment facilities are made available), it furthers much of the confusion fostered by *Robinson*. If it is true that the eighth amendment's "evolving standards of decency that mark the progress of a maturing society[14]" demand that a person not be branded a criminal for acts over which he has no control, then many changes in the area of criminal responsibility will be necessitated by the decision. However, the changes called for by the rationale of *Driver* may be too drastic for current criminal law application.

TRUSTS—DOCTRINE OF WORTHIER TITLE—HELD NOT RULE OF CONSTRUCTION—*Hatch v. Riggs Nat'l Bank, 361 F.2d 559 (D.C. Cir. 1966)*—Anna P. Hatch, settlor, established a spendthrift trust in 1923 under which she received a life income along with a testamentary power of appointment over the corpus in default of which the corpus was to go to her statutory next of kin. Settlor retained no power to revoke, alter, amend or modify

[13] See Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[14] Trop v. Dulles, 356 U.S. 86, 101 (1958).

the trust. When the trustee refused to grant the settlor's request for an additional 5,000 dollar annual stipend, she brought this action to obtain modification of the trust in the United States District Court for the District of Columbia. Summary judgement was granted against the settlor from which she appealed to the court in the instant case.[1]

Settlor based her right to recovery on the doctrine of worthier title. The doctrine states that a grant of a remainder to the heirs of the settlor is void leaving a reversion in the settlor rather than a remainder in his heirs. Invoking this doctrine, settlor claimed she was the sole beneficiary of the trust, and thus, she could revoke or modify it. In the present case, the court, affirming the district court's decision, held that the doctrine of worthier title was no part of the law of trusts of the District of Columbia either as a rule of law or as a rule of construction.[2] In so holding, the court rejected the present principles regarding the doctrine.[3]

The doctrine of worthier title had its origin in the English feudal system where it existed as a rule of law until its abrogation by statute in 1833.[4] A few of the earlier cases in the United States applied the doctrine as a rule of law.[5] However, in *Doctor v. Hughes*,[6] the leading case on this issue,

---

[1] Hatch v. Riggs Nat'l Bank, 361 F.2d 559 (D.C. Cir. 1966).

[2] *Id.* at 564. The court further held that the doctrine of worthier title would not be applied when the settlor alleged that it was impossible to obtain consent to revocation from all the beneficiaries since some of them might still be unborn. The court stated that it had as an incident to its jurisdiction an inherent power to appoint a guardian ad litem to represent and protect the interest of possible unborn heirs. The appointment of a guardian ad litem in such a case is a well established procedure in a majority of jurisdictions where it is authorized either by statute or as an incident to the court's general power of equity. Mabry v. Scott, 51 Cal. App. 2d 245, 248, 124 P.2d 659, 665, *cert. denied sub nom.*, Title Insurance & Trust Co. v. Mabry, 317 U.S. 670 (1942); Gunnel v. Palmer, 370 Ill. 206, 18 N.E.2d 202 (1938); Restatement, Property, § 182, comment *e* (1936).

[3] Jurisdictions viewing the doctrine of worthier title as a rule of construction include: California: Bixby v. California Trust Co., 33 Cal. 2d 495, 202 P.2d 1018 (1949); Massachusetts: National Shawmut Bank of Boston v. Joy, 315 Mass. 457, 53 N.E.2d 113 (1944); Missouri: Davidson v. Davidson, 350 Mo. 639, 167 S.W.2d 641 (1943); New Jersey: Fidelity Union Trust Co. v. Parfner, 135 N.J. Eq. 133, 37 A.2d 675 (1944); New York: Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221 (1919); Richardson v. Richardson, 298 N.Y. 135, 81 N.E.2d 54 (1948); *In re* Burchell's Estate, 299 N.Y. 351, 87 N.E.2d 293, *reh. denied* 300 N.Y. 498, 88 N.E.2d 725 (1949); Ohio: How the courts of Ohio will treat the doctrine of worthier title is not yet clear. Beach v. Busey, 34 Ohio Op. 204, 156 F.2d 496 (6th Cir. 1946), *cert. denied*, 329 U.S. 802 (1947); Kuhn v. Jackman, 32 Ohio App. 164, 166 N.E. 247 (1929) (citing the rule stated but deciding on other grounds); 20 Ohio Jur. 2d *Estates* § 132 (1956); Washington: McKenna v. Seattle-First Nat'l Bank, 35 Wash. 2d 662, 214 P.2d 664 (1950); See also Restatement (Second), Trusts § 127, comment *b* (1959).

[4] Act for the Amendment of the Law of Inheritance, 1833, 3 & 4 Will. 4 C. 106, § 3.

[5] Miller v. Fleming, 18 D.C. Rep. (7 Mackey) 139 (1889); Brolasky's Estate, 302 Pa. 439, 153 Atl. 739 (1931).

[6] *Supra* note 3.

Judge Cardozo's opinion established the principle that the doctrine of worthier title existed not as a rule of property but as a rule of construction.[7]

If this rule exists only as a vestige of the common law, the court would seem to have made a sound decision in totally rejecting the doctrine. However, the justification for the continued application of the doctrine as a rule of construction is generally stated to be that its application represents the probable intention of the settlor. That is, it is improbable that the owner of property would actually intend to strip himself of control over this property and create in his prospective heirs an indestructible future interest which would be detrimental to his own interests.[8] On this basis of probable intention, a majority of courts will apply the doctrine as a rule of construction unless the instrument of conveyance gives some clear expression of intention to the contrary.

The court in *Hatch* acknowledged the above reasoning, but stated that a significant purpose of the settlor of such a trust may be a desire to benefit his heirs, and an adult with a good idea of whom his heirs will be probably means what he says when he states "remainder to my heirs."[9]

There have been various inconsistent New York decisions resulting from the two possible interpretations of this clause.[10] Although these cases seem to present a "hodgepodge" of irreconcilable decisions, common to all are instances of the New York courts' reliance upon certain indications of intent found within the trust instrument.[11] These indicia which were deemed sufficient to overcome the doctrine's presumption of a reversion were also present in the trust instrument of *Hatch*, but they were not referred to nor relied upon by this court.

For example, in *Whittemore v. Equitable Trust Co.*,[12] the New York Court of Appeals relied upon the completeness of the provisions disposing of the trust corpus as evidence of the settlor's intent to create a remainder in his heirs. In this case, three settlors established a trust for a husband and wife and provided that upon the death of these two beneficiaries, the trustees were to convey the corpus to the settlors, if living. But, if any had died, his share was to go to his testamentary appointees and, in default of appointment, to such persons as would be his heirs under the statutes of descent of New York. The court held that the completeness of the disposition of the corpus was sufficient evidence of the settlor's intent to create a remainder in the heirs. Hence, the presumption, created by the doctrine that a reversion was intended, was overcome. In the present case, there is the same completeness of disposition. The corpus is to benefit the settlor for life and then pass as she appoints by will, and in default of appointment,

---

[7] See cases cited note 2 *supra*.

[8] Restatement, Property § 314, comment *c* (1940).

[9] Hatch v. Riggs Nat'l Bank, *supra* note 1, at 563.

[10] *Id.* at 564.

[11] *But see* Verrall, "The Doctrine of Worthier Title: A Questionable Rule of Construction," 6 U.C.L.A.L. Rev. 371 (1959).

[12] 250 N.Y. 298, 165 N.E. 454 (1929).

it is to pass to her statutory next of kin.[13] If the District of Columbia court had made a search for intent, this factor would have merited its consideration.

Another element of the trust which the District of Columbia court might have considered, if it had searched for indications of the settlor's intent, is made evident in the Maryland case of *Peter v. Peter*.[14] The settlor set up a spendthrift trust reserving a life estate in income and a testamentary power of appointment in default of which the corpus was to go to his heirs at law. He explicitly denied himself any power to alienate the same. The Maryland Court of Appeals construed the express denial of any power of alienation in the settlor to evidence an intention to create a remainder in the heirs by purchase.[15] If the District of Columbia court had made a determination of the settlor's intent, this same reasoning could apply to the spendthrift provision against alienation as found in the present case.[16]

Finally, the court in *Hatch* might have noted that the trust provided that in default of exercise of the testamentary power of appointment by the settlor, the corpus shall pass to settlor's "next of kin."[17] "Next of kin" is a more restrictive term than "heirs at law"[18] and would indicate an intention on the part of the settlor to confer upon certain specified persons a definite interest which could not be deprived them, except by a testamentary appointment.

Certainty of written expression and the probability of less litigation are reasons cited by the court in support of total rejection of the doctrine as a rule of construction.[19] Free alienability of property and facilitation of the revocability of trusts are reasons favoring retention of the doctrine.[20] In attempting to determine the relative weight of these reasons, no one argument decisively outbalances the other. Therefore, applicability of the doctrine must depend upon an accurate determination of the settlor's intent. Controversies concerning a grantor's intent would have arisen when he limited a conveyance to his heirs or next of kin whether or not a rule

---

13 Hatch v. Riggs Nat'l Bank, *supra* note 1, at 560.

14 136 Md. 157, 110 Atl. 211 (1920). See Reno, "Doctrine of Worthier Title As Applied In Maryland," 4 Md. L. Rev. 50, 68 (1939).

15 Peter v. Peter, *supra* note 14 at 172, 110 Atl. at 217.

16 Hatch v. Riggs Nat'l Bank, *supra* note 1, at 560. The provision referred to reads: "without the power to her to anticipate, alienate or charge the same . . ."

17 Hatch v. Riggs Nat'l Bank, *supra* note 1, 560.

18 Dalton v. White, 129 F.2d 55 (D.C. Cir. 1942); Brief for Appellee, pp. 4-5, Hatch v. Riggs Nat'l Bank, *supra* note 1; Black, Law Dictionary 1194 (4th ed. 1951); Annot., 57 A.L.R. 1180 (1928).

19 Hatch v. Riggs Nat'l Bank, *supra* note 1, at 564. *E.g.*, Simes, "Fifty Years of Future Interests," 50 Harv. L. Rev. 749, 756 (1937); Verral, "The Doctrine of Worthier Title: A Questionable Rule of Construction," 6 U.C.L.A.L. Rev. 371 (1959); Note, 48 Yale L.J. 874 (1939).

20 Restatement, Property § 314, comment *c* (1940); Warren, Book Review, 2 U. Toronto L.J. 389, 391-2 (1938); Warren, "A Remainder to the Grantor's Heirs," 22 Texas L. Rev. 22 (1943).

presuming a reversion had ever existed. The modern and more equitable trend of litigation is toward a realistic search for genuine intention, and application of this doctrine may be required in order to further a grantor's true intent. There is an abundance of evidence in the present case supporting an intent to create a remainder in the settlor's heirs. But, the court totally abandoned the search for intention. In this case, total rejection of the doctrine as a rule of construction seems to be an unnecessary and an uncompromising departure from the present majority position.

INCOME TAX—FRUSTRATION DOCTRINE—DOES NOT CONTROL THE DEDUCTIBILITY OF LEGAL EXPENSES—*Commissioner v. Tellier, 383 U.S. 687 (1966)*—In 1956 respondent, a securities dealer, was convicted of violations of three federal fraud statutes.[1] In the course of his unsuccessful defense of that criminal prosecution, respondent paid 22,964 dollars for legal services. On his federal income tax return for 1956 he claimed a deduction for that amount under section 162(a) of the Internal Revenue Code of 1954.[2] The Commissioner disallowed the deduction and was sustained by the Tax Court.[3] The Court of Appeals for the Second Circuit reversed.[4] On certiorari the Supreme Court of the United States affirmed,[5] holding that legal expenses incurred in an unsuccessful defense of a criminal prosecution, if otherwise deductible as ordinary and necessary business expenses, are not to be disallowed on public policy grounds.

In allowing the deduction the Court overturned a well established principle. Legal expenses, if incurred in the unsuccessful defense of a criminal prosecution, had been consistently[6] held by lower courts to be nondeductible either because they were avoidable and hence unnecessary, or because the allowance of such a deduction would frustrate public policy.[7]

---

1 Securities Act of 1933, 48 Stat. 84, as amended 15 U.S.C. § 77 q(a) (1964); 18 U.S.C. § 1341 (1964); 18 U.S.C. § 371 (1964).

2 26 U.S.C. § 162 (1964):

"(a) In general.

There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . ."

3 Walter F. Tellier, T.C. Memo. 1963-212, 22 CCH Tax Ct. Mem. 1062, 32 P-H Tax Ct. Mem. 1207 (1963).

4 Tellier v. Commissioner, 342 F.2d 690 (2d Cir. 1965).

5 Commissioner v. Tellier, 383 U.S. 687 (1966).

6 Note, however, that between 1944 and 1962 the official position of the Commissioner, as expressed in G.C.M. 24377, 1944 Cum. Bull. 93, was that legal expenses incurred in the unsuccessful defense of a criminal (anti-trust) prosecution were deductible. The Commissioner reversed his position in Rev. Rul. 62-175, 1962-2 Cum. Bull. 50.

7 Bell v. Commissioner, 320 F.2d 953, 956 (8th Cir. 1963); C. W. Thomas, 16 T.C. 1417 (1951). There is also some support for this position in Commissioner v. Heininger, 320 U.S. 467, 473 n.8 (1943); Burroughs Bldg. Materials Co. v. Commissioner, 47 F.2d 178 (2d Cir. 1931).

Although the Commissioner conceded that the expenses involved were "ordinary and necessary" within the meaning of section 162(a), the Court nonetheless discussed the issue, thereby adding substance to the Commissioner's concession. The Court defined "necessary" as " 'appropriate and helpful' for 'the development of the [taxpayer's] business' "[8] and stated that the function of "ordinary" was merely to distinguish non-capital from capital expenditures.[9] Having established that the "ordinary and necessary" provision was to be broadly construed, the Court then concluded that the legal fees by respondent were clearly ordinary and necessary business expenses.

With respect to denying the deduction of legal expenses on public policy grounds, the Court again made an unequivocal statement of its position: "No public policy is offended when a man faced with serious criminal charges employs a lawyer to help in his defense."[10]

The Supreme's Court decision in *Tellier* is founded upon two basic policies. The Court began with the "proposition that the federal income tax is a tax on net income, not a sanction against wrongdoing."[11] This policy of taxing net income has, however, three exceptions with respect to deductions. One of them, and that relied upon by the Commissioner, is based upon public policy.[12] To overcome the Commissioner's claim that allowance of the deduction would mean subsidizing the cost of defense,[13] the Court invoked the other policy basic to the *Tellier* decision, namely, that of encouraging effective assistance of counsel. After acknowledging that *Gideon v. Wainwright*[14] established a criminal defendant's constitutional right to counsel, Mr. Justice Stewart continued: "In an adversary system of criminal justice, it is a basic of our public policy that a defendant in a criminal case have counsel to represent him."[15]

Commissioner v. Tellier thus leaves no room for future decisions that legal expenses, otherwise deductible, are nondeductible on public policy grounds. The expenses involved were incurred in the *unsuccessful* defense of a *criminal* prosecution. These are the very elements upon which the Commis-

---

[8] 383 U.S. at 689, quoting from Welch v. Helvering, 290 U.S. 111, 113 (1933).

[9] 383 U.S. at 689.

[10] *Id.* at 694.

[11] *Id.* at 691.

[12] The other exceptions are specific legislation and "a precise and longstanding Treasury Regulation." 383 U.S. at 693.

[13] Judge Learned Hand had made much the same argument: "Indeed, to hold [that legal expenses are always deductible] would be to subsidize the obduracy of those offenders who were unwilling to pay without a contest and who therefore added impenitence to their offence." Jerry Rossman Corp. v. Commissioner, 175 F.2d 711, 713 (2d Cir. 1949).

[14] 372 U.S. 335 (1963).

[15] 383 U.S. at 694. Allowance of the deduction may, however, be required by more than policy. Since Gideon v. Wainwright is constitutionally based, disallowance of the deduction may be unconstitutional if it interferes with the right to effective assistance of counsel.

sioner had focused in holding attorney's fees nondeductible.[16] Moreover, by establishing that public policy *favored* expenditures made for the purpose of obtaining legal assistance in defending against a criminal prosecution, the Court completely removed such counsel fees from the scope of the public policy exception.[17]

While *Tellier* forecloses the legal expenses aspect of the frustration doctrine, it is also significant in that it provides a basis for forecasting the technique the Court will employ in resolving other frustration doctrine issues, such as the deductibility of unlawful expenses and penalties. The importance of this latter feature of the *Tellier* decision arises from the fact that two previous Supreme Court frustration doctrine cases, *Commissioner v. Sullivan*[18] and *Tank Truck Rentals v. Commissioner*,[19] have been looked upon as being inconsistent, even irreconcilable,[20] with respect to the manner in which deductibility is to be determined. As the *Tellier* Court cites both *Sullivan* and *Tank Truck Rentals* with approval, reconciliation is made not only desirable but also necessary. Close analysis of the *Tellier* decision, in conjuction with *Sullivan* and *Tank Truck Rentals*, does reveal a pattern of decision consistent with the result of all three cases.

The apparent conflict between *Sullivan* and *Tank Truck Rentals* is clear enough. In *Sullivan* the Supreme Court upheld a deduction of rent and wages claimed by the proprietor of a gambling establishment even though the rent and wage payments were illegal under state law. In *Tank Truck Rentals*, on the other hand, the Court stated that "the test of nondeductibility always is the severity and immediacy of the frustration resulting from allowance of the deduction."[21] The apparent inconsistency of the two cases is highlighted by the declaration in *Tank Truck Rentals* that "certainly the frustration of state policy is most complete and direct when the expenditure for which deduction is sought is itself prohibited by statute."[22] Thus if the *Tank Truck Rentals* "test of nondeductibility" is applied to the deduction sought in *Sullivan*, disallowance thereof would seem to follow as a matter of course. As the deduction was permitted, one can only conclude

---

[16] Rev. Rul. 62-175, 1962-2 Cum. Bull. 50.

[17] The response of the Internal Revenue Service to *Tellier* is found in T.I.R.-861. It is there stated that the Service

> will apply the principle of the *Tellier* decision and will allow as deductions attorneys' fees and related legal expenses paid or incurred in the unsuccessful defense of a prosecution for violation of the Sherman Anti-Trust Act or in the unsuccessful defense of claims under § 4A of the Clayton Act or the Federal False Claims Act, provided such expenditures are otherwise deductible under the Code as ordinary and necessary business expenses.

[18] 356 U.S. 27 (1958).

[19] 356 U.S. 30 (1958).

[20] Note, 5 N.Y.L.F. 204, 213-14 (1959); Note, 72 Yale L.J. 108, 137-38 (1962). See also, Lindsay, "Tax Deductions and Public Policy," 41 Taxes 711, 717-18 (1963); "The Supreme Court 1957 Term," 72 Harv. L. Rev. 77, 116 (1958).

[21] 356 U.S. at 35.

[22] *Ibid.*

that the severity and immediacy of the frustration is *not* the only test of nondeductibility. Rather the *Sullivan* case and the emphasis given in *Tellier* to the policy of taxing only net income[23] indicate that the relationship of the expense to net income is a factor of considerable determinative importance. Judging from the construction of the *Tellier* opinion, it appears that the policy of taxing net income is balanced against the possibility of frustration of public policy, with focus upon the relevant state or federal statute for an expression of the latter policy. The relationship of the expense to the net income of the business must be studied, including, perhaps, consideration of the regularity of the expense, of whether it is productive of income, and of whether it is necessary to the functioning of the business. If there is a close relationship between the expense and net income, the policy of taxing only net income will have greater influence on the disposition of the case than if the relationship is a vague one. Balanced against the policy of taxing net income is the possibility of frustration of public policy. In *Sullivan* the net income policy prevailed because the expenses involved (rent and wages) were regular, necessary, and directly related to the production of income. The public policy was expressed only in a generally worded state statute[24] which made no express reference to the expenses sought to be deducted. On the other hand, in *Tank Truck Rentals*, a penalties case, the net income policy, while deserving considerable weight according to the facts of the case, was outweighed by public policy considerations, since allowance of the deduction would have mitigated the statutorily imposed sanction and tended "to destroy the effectiveness of the State's maximum weight laws."[25]

While any balancing process is difficult to administer, recognition of the net income—public policy balancing test suggested by *Tellier*—should lead to greater uniformity in an area of the law marked by inconsistency.

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS—CORPORATION FOR PROFIT—STATUTORY EXEMPTION FOR PRIVATE CLUBS INAPPLICABLE—*Clover Hill Swimming Club v. Goldsboro, 47 N.J. 25, 219 A.2d 161 (1966)*—Plaintiff, a Negro veterinarian, brought an action against Clover Hill Swimming Club, Inc. alleging that he had been denied membership in the club because of his race. Clover Hill is privately owned and is operated for profit. It is organized on the plan of a private membership club but it is controlled and operated by the stockholders, not by the members. After establishing that Clover Hill had engaged in discriminatory practices, the State Director of the Division on Civil Rights concluded that the club was a place of public accommodation and

---

[23] 383 U.S. at 691.

[24] Ill. Laws 1887, p. 95, since repealed and replaced by Ill. Ann. Stat. ch. 38, §§ 28-1 and 28-3 (Smith-Hurd 1964).

[25] 356 U.S. at 35.

directed it to admit the plaintiff. On appeal the New Jersey Supreme Court affirmed.[1]

The New Jersey "Law Against Discrimination" specifically exempts "bona fide clubs" and other "distinctly private" accommodations.[2] In addition, thirty five states and the District of Columbia have enacted similar statutes, and in all cases private clubs are exempted either explicitly or by reference to public facilities.[3]

In attempting to apply the public accommodation statutes, the various jurisdictions have relied on a number of legal principles and rules of interpretation to distinguish between public and private accommodations. Many of the earlier cases interpreted the word "public" in a very narrow sense, often relying on common law definitions which distinguished a public accommodation from a private business.[4] In those jurisdictions with statutes which enumerate particular establishments embraced by the statute, many of the courts have applied the "like kind" or *ejusdem generis* doctrine which limits the application of the statute to establishments of a "like nature."[5] Still other courts have sought to carry out the purpose of the statute by construing the statutes quite liberally.[6] However, the exact differentiation between a public accommodation and a bona fide private club has never been clearly drawn.

In deciding whether a particular organization is a public or a private accommodation, *Clover Hill* held that the controlling question is whether or not the organization owes its existence to a personal desire on the part of the members to associate themselves with one another. This fundamental question, which is derived from the individuals' right of privacy and freedom of association,[7] can only be answered by viewing the various aspects of a particular organization as a totality. The following questions reflect the criteria used by the court for deciding the "associational preference" question. Is the organization a commercial establishment operated for a profit? Does the club solicit members from the public at large? To what extent do the members enter into the management of the club?

Clover Hill was admittedly organized for profit and chartered as such under the New Jersey laws of incorporation. The court indicated that this fact alone would be enough to exclude Clover Hill from the exclusion given the bona fide private clubs. Since the club's objective was to show a profit it did not "owe its existence to the associational preference of its members but

1 Clover Hill Swimming Club v. Goldsboro, 47 N.J. 25, 219 A.2d 161 (1966).

2 N.J. Stat. Ann. § 18:25-5(L) (West Supp. 1964).

3 Note, "Public Accommodation Laws and the Private Club," 54 Geo. L.J. 915, 916, 918 (1966).

4 Faulkner v. Solazzi, 79 Conn. 541, 65 Atl. 947 (1907).

5 *E.g.* Reed v. Hollywood Professional School, 169 Cal. App. 2d 887, 338 P.2d 633 (Super. Ct. 1959); Rice v. Rinaldo, 61 Ohio L. Abs. 187, 119 N.E.2d 657 (Ct. App. 1951).

6 *E.g.* Evans v. Ross, 57 N.J. Super. 223, 154 A.2d 441 (App. Div. 1959), *cert. denied*, 31 N.J. 292, 157 A.2d 362 (1960).

7 Note, *supra* note 2, at 918.

to the coincidence of their interest in the facilities offered by the owners."[8] In other cases clubs have been more subtle in their efforts to avoid the public accommodation laws by establishing non-profit organizations. In such cases the courts have looked beyond the superficial structure of the organization itself and made inquiries into the amount of rent the organization pays and to whom it is paid,[9] the salaries that certain officers receive[10] and the previous organizational structure if the club has not always operated on a membership basis.[11] If the profits that would ordinarily accrue to an establishment are being siphoned off by exhorbitant rent or salaries rather than being returned to the members, the organization would undoubtedly be looked upon as a purely commercial venture. The commercial nature of the venture becomes especially important when considered in light of such statutes as the recently amended California Civil Rights Act which makes it unlawful to discriminate because of race "in all *business* establishments of every kind whatsoever."[12] (Emphasis added).

Another inquiry made by the court was whether Clover Hill had extended an invitation to the public. The court held that

> an establishment which by advertising or otherwise extends an invitation to the public generally is a place of public accommodation and cannot use race . . . as a basis for refusing . . . those . . . who have accepted.[13]

Clover Hill had not engaged in any formal advertising but by placing an advertisement in a local newspaper, ostensibly to promote safe ice skating, and by erecting a sign containing two telephone numbers at the entrance of the club, they had provided a means with which potential applicants could communicate with them and in so doing had extended an irrevocable invitation to the public at large. "Once a proprietor extends his invitation to the public he must treat all members of the public alike."[14] This is not to say that a public accommodation operated on a membership basis must accept all applicants or that they cannot limit the use of the facilities to club members. But the case does hold that race cannot be used as a criteria for issuing memberships.

All aspects of Clover Hill's organization, including the selection of new members, were controlled by a board of directors selected from the stockholders. The court found this to be quite inconsistent with the purpose of the statutory exemption, *i.e.*, "to protect the personal associational preferences

---

8 47 N.J. at ——, 219 A.2d at 161 (1965).

9 Castle Hill Beach Club v. Arbury, 2 N.Y.2d 596, 142 N.E.2d 186 (1957).

10 Lackey v. Sacoolas, 41 Pa. 235, 191 A.2d 395 (1963).

11 Sutton v. Capital Club Inc., 10 Race Rel. L. Rep. 791 (E.D. Ark. 1965).

12 Cal. Civ. Code § 51 (Supp. 1965).

13 47 N.J. at ——, 219 A.2d at 165.

14 Evans v. Ross, 57 N.J. Super. 223, 231, 154 A.2d 441, 445 (App. Div. 1959).

of . . . [the] members."[15] An organizational structure that does not provide a means with which the members can exercise an "associational preference" through the selection of the officers and members casts doubt on the authenticity of the club. Bona fide private clubs are usually controlled by their members while private facilities, seeking to avoid the consequences of the civil rights statutes, are usually controlled by the owners.[16]

It is manifestly impossible to establish an exact formula with which the "associational preference" question can be decided. But by considering the criteria set out in *Clover Hill* some insight into the true nature of the organization may be obtained.

FEDERAL CRIMINAL PROCEDURE—USE OF GRAND JURY TESTIMONY FOR IMPEACHMENT—*Dennis v. United States, 384 U.S. 855 (1966)*—The defendants, officers of the International Union of Mine, Mill and Smelter Workers, were indicted for conspiracy to defraud the United States.[1] The defendants, in order to obtain the services of the NLRB for their union, had filed non-Communist affidavits as required by section 9(h) of the Taft-Hartley Act.[2] The government alleged that the defendants had conspired to avail themselves of the services by pretending to resign from the Communist Party and then filing the required affidavits. At the first trial defendants were convicted of the conspiracy, but the convictions were reversed on the ground that prejudicial hearsay evidence was admitted.[3] On retrial petitioners were again convicted, and the convictions were affirmed by the Court of Appeals for the Tenth Circuit.[4] The Supreme Court granted certiorari limited to the analysis of three questions[5] and reversed the convictions, holding: That it was error for the trial court to refuse defendants' motion

---

[15] 47 N.J. at ——, 219 A.2d at 166.

[16] Brackeen v. Ruhlman, 3 Race Rel. L. Rep. 45, 48 (Pa. C.P. 1957).

---

[1] 18 U.S.C. § 371 (1964), provides: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisioned not more than five years or both . . . ." See generally, Goldstein, "Conspiracy to Defraud the United States," 68 Yale L.J. 405 (1959).

[2] See 73 Stat. 536, 29 U.S.C. 504 (1964), replacing section 9(h), making it a crime for a Communist Party member to hold office in any labor union. This statute was held unconstitutional in United States v. Brown, 381 U.S. 437 (1965).

[3] Dennis v. United States, 302 F.2d 5 (10th Cir. 1962).

[4] Dennis v. United States, 346 F.2d 10 (10th Cir. 1965).

[5] (1) Does the indictment state the offense of conspiracy to defraud the United States? (2) Is section 9(h) of the Taft-Hartley Act constitutional? (3) Did the trial court err in denying petitioners motion for disclosure of grand jury testimony? The Court held the indictment was sufficient but that petitioners, by originally attempting to avoid the courts, had no standing to challenge the constitutionality of the statute. The third question is discussed herein.

for inspection of the related statements made by government witnesses before the grand jury for purposes of impeachment.[6]

Grand jury testimony may be furnished to the defense in federal courts under Rule 6(e) of the Federal Rules of Criminal Procedure,[7] and petitioners argued that they had met the "particularized need" test for production under that rule as established in *Pittsburgh Plate Glass Co. v. United States*,[8] since their convictions were primarily based on the uncorroborated oral statements of certain government witnesses.

Pittsburgh Plate Glass held that where a particularized need could be shown which outweighed the need for secrecy, the defendant was entitled to inspect the relevant grand jury testimony for purposes of impeachment. What was mean by "particularized need" has since been unclear as the only standards were that a preliminary showing of inconsistency in testimony was not necessary[9] and that disclosure was proper where the ends of justice required it.[10]

Following *Pittsburgh Plate Glass* there developed a split in the federal circuits as to that case; it became an authority for both allowing[11] and, more often, denying[12] defendants access to the grand jury minutes. It was this split that the Court attempted to eliminate through the announcement of a clearer standard in the instant case.

The development of a standard for production of grand jury minutes to the defense began in *United States v. Socony-Vacuum Oil Co.* in which the Court said, "But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."[13] *United States v.*

---

[6] Dennis v. United States, 384 U.S. 855 (1966).

[7] The relevant section of Rule 6(e) states,

> Disclosure of matters occurring before the grand jury other than deliberations and the vote of any juror may be made available to the attorneys for the government for the use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that ground may exist for a motion to dismisss the indictment because of matters occurring before the grand jury.

[8] Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959).

[9] *Id.* at 400.

[10] *Id.* at 401.

[11] See, *e.g.*, DeBinder v. United States, 292 F.2d 737 (D.C. Cir. 1961); United States v. Giampa, 290 F.2d 83 (2d Cir. 1961) (dictum); United States v. Hernandez, 282 F.2d 71 (2d Cir. 1960).

[12] See, *e.g.*, Bary v. United States, 292 F.2d 53 (10th Cir. 1961); United States v. Coduto, 284 F.2d 464 (7th Cir. 1961), *cert. denied*, 365 U.S. 881 (1961); Travis v. United States, 269 F.2d 928 (10th Cir. 1959), *rev'd on other grounds*, 364 U.S. 631 (1961). See, Traynor, "Ground Lost and Found in Criminal Discovery," 39 N.Y.U.L. Rev. 228, 239 n.56 (1964). See generally, Note 111 U. Pa. L. Rev. 1154, 1181-89 (1963).

[13] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940).

Procter & Gamble followed stating that, "there is a long established policy that maintains the secrecy of grand jury testimony,"[14] but, "problems concerning the use of grand jury testimony transcripts at the trial to impeach a witness, to refresh his recollection and to test his credibility . . . , 'are' cases of particularized need where the secrecy of the proceedings is lifted discreetly and limitedly."[15]

Most of the present disagreement as to when testimony should be disclosed stems from the fact that on the face of *Pittsburgh Plate Glass* there seemed to be a possibility of impeaching an important government witness if access to grand jury testimony were granted, yet the court refused to find that this was a case of particularized need and did not order production. *Dennis* distinguished *Pittsburgh Plate Glass* saying that it was based on petitioner's demand as a right and his failure to show any need, there being sufficient proof of the offense without reference to the witness's trial testimony.[16] The question is, are all requests for impeachment testimony now cases of particularized need? The answer, as will be developed, seems to be a qualified yes.

Pointing the way to the establishment of a new standard for the production of grand jury minutes is the Court's re-evaluation of the applicability of the rationale of *Jencks v. United States*[17] and the resulting Jencks Act which permits disclosure to the defense, for impeachment purposes, of certain pretrial statements held by the government, on the theory that a fairer trial will result from the defense having access to this often necessary evidence.[18] In the past the *Jencks*' rationale has not been applied to the grand jury testimony.[19] Commentators have pointed out that the legislative materials upon

---

[14] United States v. Procter & Gamble, 356 U.S. 677, 681 (1957).

[15] Dennis v. United States, 384 U.S. 855, 870 (1966) quoting from United States v. Procter & Gamble, 356 U.S. 677, 683 (1960), where the statement was,

> We do not reach in this case problems concerning the use of grand jury transcripts at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like. Those are cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly.

[16] 384 U.S. 855, where the Court said at 869-70, "In general, however, the Court has confirmed the trial court's power under Rule 6(e) of the Federal Rules of Criminal Procedure to direct disclosure of grand jury testimony 'preliminary to or in connection with a judicial proceeding.'"

[17] Jencks v. United States, 353 U.S. 657 (1957).

[18] See Campbell v. United States, 365 U.S. 85, 92 (1961):

> To that extent, as the legislative history makes clear, the Jencks Act 'reaffirms' our holding in Jencks v. United States, 353 U.S. 657, that the defendant on trial in a federal criminal prosecution is entitled, for impeachment purposes, to relevant and competent statements of a government witness in possession of the Government touching the events or activities as to which the witness has testified at trial . . . . The command of the statute is thus designed to further the fair and just administration of criminal justice, a goal of which the judiciary is the special guardian.

[19] Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 398 (1959).

which the Court's prior position was based show no policy against disclosure of grand jury testimony,[20] and the Court's approval of *Jencks* in *Dennis* strongly points to the adoption of a *Jencks*-like procedure to allow disclosure of testimony after the witness has testified in court.[21] Likewise, the growing use of discovery in the civil courts and the implementation of more discovery in the criminal rules, particulary those not covered under the Jencks Act, are cited with favor.[22]

At the heart of the problem is the balancing factor: the need of the defendant versus the needs of society for secrecy in the use of grand jury materials. The Court states that in the use of grand jury testimony for impeachment, the need for secrecy generally is at best minimal[23] and that the traditional arguments for secrecy did not apply.[24] This is particularly true where the need for disclosure is very compelling.[25]

"In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact."[26] There is never any justification for relying on the assumption that no important inconsistencies will come to light if the grand jury

---

[20] See Sherry, "Grand Jury Minutes: The Unreasonable Rule of Secrecy," 48 Va. L. Rev. 668 (1962); Traynor, *supra* note 12, at 240; "The Supreme Court, 1958 Term," 73 Harv. L. Rev. 84, 185 (1959); Murphy, Congress and the Court, 127 (1962).

[21] 384 U.S. at 870, where the Court said,

> These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice. This realization is reflected in the enactment of the so-called Jencks Act . . . responding to this Court's decision in Jencks v. United States . . . .

[22] *Id.* at 871, n.17 and related text.

[23] *Id.* at 872 n.18 citing Brennan's dissent in Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 405 (1959); Calkins, "Grand Jury Secrecy," 63 Mich. L. Rev. 455 (1964); Brennan, "The Criminal Prosecution: Sporting Event or Quest for Truth?" 1963 Wash. U.L.Q. 279; Sherry, *supra* note 20.

[24] The traditional arguments for secrecy as stated in United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954) and United States v. Amazon Industrial Chemical Corp., 55 F.2d 254, 261 (D.C. Md. 1931), are (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

[25] The Court in *Dennis*, 384 U.S. at 872-73, lists five facts which displayed the requisite need, (1) 7 year delay in trial, (2) testimony of witness in question was crucial, (3) important evidence was uncorroborated oral statements, (4) witnesses had possible reasons for perjury, (5) one significant error had been discovered.

[26] Dennis v. United States, 384 U.S. 855, 873 (1966).

testimony is compared and examined.[27] Even with the petitioner having an opportunity to thoroughly cross examine the witness and no inconsistencies being found, the possibility still exists for finding inconsistencies in the two testimonies.[28] It is now clear that for the defense to be allowed access to grand jury minutes it is not necessary to show that there in fact is a possibility of impeachment; only the most limited grounds for showing possible value in impeachment need be laid.

Along with facilitating access to the grand jury minutes for the defense, the court ruled on how inspection of these minutes was to be made. The in camera inspection used in the Second Circuit,[29] though it was found to be useful when the judge rules on a defense motion for production to it of grand jury testimony, cannot be a prerequisite for inspection by the defendant because it places too great a burden on the judge in looking for inconsistencies and because effective determination of what may be useful to the defense can properly and effectively be made only by an advocate.[30] The trial judge's function is limited to determining whether a case has been made for production and to supervise the process, that is to cause the elimination of extraneous matter and to rule upon the application by the government for protective orders.[31]

It is clear that for the defense to now obtain production of grand jury minutes it need only show that impeachment may have some bearing[32] on the outcome of the case. It then becomes the burden of the government to show that the need for secrecy outweighs the defense's need by the "clearest and most compelling considerations."[33] The judge may have to delete extraneous material and items such as the votes of the jurors, but the inspection

---

[27] *Id.* at 874.

[28] *Id.* at 866-69, 874.

[29] See United States v. Giampa, 290 F.2d 83 (2d Cir. 1961). In camera inspection is a procedure whereby the judge in privacy previews the particular testimony before deciding which parts are relevant to the defense and should be given to it.

[30] Dennis v. United States, 384 U.S. 855, 874-75 (1966).

[31] *Ibid.* This is much like the procedure used under the Jencks Act, 18 U.S.C. 3500(c) (1964) which states:

> If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statements which do not relate to the subject matter of the testimony of the witness . . .

[32] See also Louisdell, "Criminal Discovery: Dilemma Real or Apparent?," 49 Calif. L. Rev. 56, 73 (1961).

[33] See Brennan's dissent in *Pittsburgh Plate Glass*, *supra* note 23 at 407:

> Surely "Justice requires no less" Jencks v. United States, . . . than the defense be permitted every reasonable opportunity to impeach a government witness, and that a criminal conviction not be based on the testimony of untruthful or inaccurate witnesses. The interest of the United States in a criminal prosecution, it must be emphasized, "is not that it shall win a case but that justice shall be done . . . ."

See also United States v. Zborowski, 271 F.2d 661, 667 (2d Cir. 1959).

seems now to be available to the defendant only upon showing of some value of impeachment.[34]

Judging from the experience of other jurisdictions which have made defense access to grand jury minutes easier,[35] there is no reason to fear *Dennis* will impede the effective administration of criminal justice, and it would appear that Rule 6(e) may well permit disclosure *before* the witness has testified.[36] The question remains whether this decision will be binding on the states, particularly those like Ohio which do not allow any disclosure.[37] The decision itself probably will not directly affect the states since the decision was based upon an interpretation of federal procedure and not constitutional grounds as was *Jencks* which has been interpreted so as not to bind the states.[38] However, some of the authorities feel that a complete denial of access to grand jury minutes would be violative of the right to a fair trial guaranteed under the fourteenth amendment.[39]

TORTS—NEGLIGENT INTERFERENCE WITH CONTRACT RIGHTS—DAMAGES HELD NOT TO INCLUDE PORTION OF CONTRACT PROPERTY—*Rockaway Blvd. Wrecking & Lumber Co. v. Raylite Elec. Corp., 26 App. Div. 2d 9, 269 N.Y.S.2d 926 (1966)*—Plaintiff, Rockaway Boulevard Wrecking & Lumber Company, was under contract with the New York Housing Authority to demolish a building owned by the Authority. In addition, the contract provided that the materials forming a permanent part of the building "shall become" property of the plaintiff upon demolition of the building.[1] A fire,

[34] Dennis v. United States, 384 U.S. 855, 873 (1966).

[35] For a suggested procedure see Brennan's dissent in *Pittsburgh Plate Glass*, at 409-10.

[36] See, Sherry, *supra* note 20 at 681-84 (discussion of California procedure and results), *cf.* Louisell, *supra* note 31 at 65-67 (discussion of the English system).

[37] State v. Rhoads, 81 Ohio St. 397, 91 N.E. 186 (1910); State v. Shelby, 69 Ohio L. Abs. 481, 126 N.E.2d 606 (C.P. 1955).

[38] See, Riser v. Teets, 253 F.2d 844 (9th Cir.), *cert. denied*, 357 U.S. 944 (1958); Anderson v. State, 239 Ind. 372, 156 N.E.2d 384 (1959); People v. Marshall, 5 App. Div. 2d 352, 172 N.Y.S.2d 237 (1958). See also Palermo v. United States, 360 U.S. 343, 345 (1959). See, The Supreme Court, 1958 Term, *supra* note 20 at 182; Note, 34 N.Y.U.L. Rev. 606, 618 (1959).

[39] See Brennan's concurrence, Palermo v. United States, 360 U.S. 342, 362 (1959): "It is true that our holding in Jencks was not put on Constitutional grounds, for it did not have to be; but it would be idle to say that the commands of the Constitution were not close to the surface of the decision; indeed, the Congress recognized its Constitutional overtones in the debates on the statute." See Traynor, *supra* note 9 at 242 n.77. *Cf.* United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir. 1961), noted in 62 Colum. L. Rev. 526 (1962), (Suppression by prosecutor of material evidence violates due process); Gordon v. State, 104 So. 2d 534 (Fla. 1958) (Refusal to permit inspection of own statements in perjury trial was the denial of a fair trial.).

[1] Rockaway Blvd. Wrecking & Lumber Co. v. Raylite Elec. Corp., 26 App. Div. 2d 9, 10, 269 N.Y.S.2d 926, 928 (1966).

alleged to have been negligently started in an adjoining warehouse owned by the defendant, spread to the building the plaintiff was under contract to demolish and caused considerable damage.

Plaintiff brought a property action in the civil court of New York City to recover 2,000 dollars for damages to the salvageables and 890 dollars for added costs incurred in demolition of the building as a result of the fire. The defendant's motion for summary judgment on the grounds that the plaintiff had no interest in the building or salvageables sufficient to sustain a cause of action was denied by the civil court and affirmed by the Appellate Term of the Supreme Court in the First Judicial Department. On appeal, the Appellate Division of the Supreme Court for the same department held "[A]lthough something short of legal ownership, the contractor's interest in the salvageables was sufficently cognizable at the time of the fire to ground the present action for damages."[2] However, as to the extra costs incurred in demolition of the building the court reaffirmed the "general rule" prohibiting recovery for negligent interference with contract rights and denied that portion of the plaintiff's claim.[3]

The problem of how far, and against what types of invasion the rights obtained under a contract will be protected has been troubling courts and legal writers for many years.[4] Most courts agree that an intentional and malicious interference with a contract relationship by an outside party will support an action for damages.[5] However, if C, through his negligence, causes A to break his contract with B or negligently imposes a greater contract burden on B than was originally contemplated, then courts will generally refuse to allow B to recover damages in an action against C.[6]

Many reasons have been advanced by the courts to support their refusal to allow recovery for negligent interference with contract rights. (1) It would place an undue burden upon freedom of action and impose a severe penalty for negligent conduct.[7] (2) It would lead to collusive claims.[8] (3) It

---

[2] *Id.* at 12, 269 N.Y.S.2d at 929.

[3] *Ibid.*

[4] See, Carpenter, "Interference With Contract Relations," 41 Harv. L. Rev. 728 (1928); Harper, "Interference With Contractual Relations," 47 Nw. U.L. Rev. 873 (1953); Green, "Relational Interests," 29 Ill. L. Rev. 1041 (1935); Note, 31 Harv. L. Rev. 1017 (1918); Note, 16 Stan. L. Rev. 664 (1964); Comment, 18 Cornell L.Q. 292 (1933).

[5] *E.g.*, Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853); S. C. Prosner Co. v. Jackson, 223 N.Y. 325, 119 N.E. 573 (1918); Carnes v. St. Paul Union Stockyards Co., 164 Minn. 457, 205 N.W. 630 (1925).

[6] *E.g.*, Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927); Connecticut Mut. Life Ins. Co. v. New York & N.H.R.R., 25 Conn. 265 (1856); Stevenson v. East Ohio Gas Co., 47 Ohio L. Abs. 586, 73 N.E.2d 200 (Ct. App. 1946); Byrd v. English, 117 Ga. 191, 43 S.E. 419 (1903).

[7] Stevenson v. East Ohio Gas Co., *supra* note 6; Byrd v. English, *supra* note 6.

[8] Connecticut Mut. Life Ins. Co. v. New York & N.H.R.R., *supra* note 6. The courts feel that if A negligently injures B, B and C will be in a position to "invent" a contract whereby C will profit from B's inability to perform.

would be difficult to apportion damages.[9] (4) The damages are too remote.[10] (5) The damages are unforeseeable.[11]

The court in the *Rockaway* case[12] was not willing to overrule this strong judicial precedent[13] when it permitted the plaintiff to recover for damages done to the salvageables. Instead, they recognized the right to future possession of a chattel as a protectable interest similar to a bailor's right to sue for damage to a chattel while in the possession of a bailee.[14] To insure that it would not be understood that they were protecting the plaintiff's contract rights the court clearly reaffirmed the rule prohibiting recovery for negligent interference with contract rights when they denied recovery for the increased demolition costs.

Despite an attempt to camouflage their decision, the court was, in effect, recognizing the plaintiff's right to the salvageables as a contract right to be protected against negligent interference. The court then proceeded to draw a questionable distinction when they refused to allow recovery for the negligent creation of the added cost of demolition.[15] The right to the salvageables stemmed from an executory contract. The defendant damaged the salvageables, thereby injuring the plaintiff's property—the contract right to the salvageables. Likewise, the negligence of the defendant increased the cost of demolishing the building. In this way the defendant's conduct also injured the plaintiff's property—the contract right to performance as was originally contemplated by the parties.

The confusion surrounding the decision in the *Rockaway* case is a result of the basic disagreement over the extent to which negligent interference with contract rights should be an actionable tort. Although there seems to be general agreement that negligent interference with a contract right is not actionable,[16] because of the questionable validity of the reasons advanced to support this rule results are reached, as in the instant case, where, in effect, negligent interference with a contract right was considered actionable although the court characterized the action as protection of "a right to future possession of a chattel."[17]

The weakness of the reasons advanced to deny liability for negligent interference with contract rights, while recognizing liability for intentional

[9] Note, 31 Harv. L. Rev. 1017, 1020 (1918). As in the present case, there might be a problem apportioning damages between the plaintiff and the New York Housing Authority.

[10] Byrd v. English, *supra* note 6; Chelsea Moving & Trucking Co. v. Ross Towboat Co., 280 Mass. 282, 182 N.E. 477 (1932).

[11] Robins Dry Dock & Repair Co. v. Flint, *supra* note 6.

[12] 26 App. Div. 2d 9, 269 N.Y.S.2d 926 (1966).

[13] Cases cited *supra* note 6.

[14] The court cited the case of Royal Stein, Inc., v. B.C.U. Holding Corp., 283 App. Div. 700, 127 N.Y.S.2d 886 (1954) in which the bailor sued for damage done to his reversionary interest in a chattel.

[15] Rockaway Blvd. Wrecking & Lumber Co. v. Raylite Elec. Corp., 26 App. Div. 2d 9, 12, 269 N.Y.S.2d 926, 929.

[16] Cases cited note 6 *supra*.

[17] Rockaway Blvd. Wrecking & Lumber Co. v. Raylite Elec. Corp. *supra* note 1.

interference, is best shown by the arguments that extension of liability would lead to collusive claims[18] and difficulty in apportioning damages.[19] These two arguments are not peculiar to negligence cases. The very same problems are involved in intentional interference with contract cases, but have not been an impediment to the growth of liability in that area.[20]

Further, the argument that it would place an undue burden upon freedom of action and be a severe penalty for negligent conduct[21] was used years ago to deny recovery to injured parties not in privity with the manufacturer of a defective product.[22] Today this field of torts has advanced beyond liability for negligence[23] into the area of strict liability.[24]

The final two arguments advanced to deny recovery, that the damages were too remote[25] or unforeseeable[26] are immediately recognized as well established doctrines of negligence law. To say that the damages were too remote or unforeseeable is to simply say that the defendant was not negligent, and not that there is no recognized cause of action for negligent interference with contract rights.

Therefore, perhaps a more consistent result could have been achieved in the *Rockaway* case if the court had begun by recognizing the tort of negligent interference with contract rights and then applied the standard rules of negligence. The damage to the building adjoining the defendant's property was a foreseeable risk. Hence, all persons with a recognizable property right in the building, whether present or future right, could sue for damage to such interest. However, the added cost of demolishing the building was beyond the scope of the risk created by the defendant and therefore the plaintiff cannot recover, but not because there was no remedy, but because there was no wrong.

In conclusion, the court in the *Rockaway* case did reach the right result, but arguably for the wrong reasons. No insurmountable objection exists to allowing recovery for negligent interference with contract rights Foreseeability and proximate cause are adequate devices to limit the scope of liability as the courts see fit according to the facts of each case. But the reasons advanced in the *Rockaway* case to allow recovery for damages to the salvageables and to deny recovery for the added costs of demolition will only perpetuate an area of the law that remains beclouded by antiquated reasoning and decisions.

---

18 Connecticut Mut. Life Ins. Co. v. New York & N.H.R.R., *supra* note 6.

19 *Supra* note 9.

20 *Supra* note 5.

21 *Supra* note 7.

22 Huset v. J. I. Case Threshing Mach. Co., 120 F. 865 (8th Cir. 1903); Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

23 *E.g.*, MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

24 Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958); Colon v. Republic Aviation Corp., 204 F. Supp. 865 (S.D. N.Y. 1960); Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965); Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 N.E.2d 92 (1965).

25 *Supra* note 10.

26 Robins Dry Dock & Repair Co. v. Flint, *supra* note 6.

CRIMINAL LAW—NONCONSENSUAL BLOOD-ALCOHOL TEST HELD NOT TO BE VIOLATIVE OF FOURTH OR FIFTH AMENDMENTS—*Schmerber v. California, 384 U.S. 757 (1966)*—After an automobile collision in which he was the driver, petitioner was taken to a hospital. There, an investigating officer detected alcohol on petitioner's breath and arrested him for driving under the influence of alcohol. Upon advice of counsel, petitioner refused to submit to a blood alcohol test, but, the police rejected this and, without a warrant, ordered that a sample be taken. Over petitioner's objection on fourth, fifth, sixth, and fourteenth amendment grounds, the test results were admitted at trial and he was convicted. The conviction was affirmed, and certification to the California District Court of Appeals was denied. The Supreme Court of the United States granted certiorari,[1] and affirmed holding, *inter alia*: (1) nonconsensual blood tests are not testimonial and thus not within the scope of the privilege against self-incrimination, and (2) although such intrusions do constitute searches and seizures, they nevertheless are constitutional if justified, and if the procedures employed in taking blood meet fourth amendment standards of reasonableness.[2] Because an earlier case had held such tests to comport with due process,[3] the Court had no trouble overruling petitioner's fourteenth amendment objection. Dealing next with petitioner's self-incrimination challenge, the Court had to consider the scope of the fifth amendment. One week earlier, in *Miranda v. Arizona*,[4] strong safeguards against excesses of police interrogation had been provided by the Court in order to guarantee the inviolability of the privilege in the pretrial investigative process. The statement in that case, that the government must convict an accused, "by its own independent labors . . . ,"[5] would seem to create doubt as to whether the police are permitted, by the fifth amendment, to compel an accused to cooperate at all in collecting evidence against him, regardless of whether the evidence sought is such as has traditionally been considered to be privileged, or, is just physical evidence in the accused's control. If such a policy had been intended, compelling petitioner to submit to a blood test would have violated the privilege.[6]

But the scope of the fifth amendment privilege, adopted by the Court in *Schmerber*, is not that broad. The telling quality of privileged matter, by the Court's analysis, is that it invokes only the "testimonial capacity" of the person from whom it is compelled. This language suggests, as the Court acknowledges,[7] a widely applied test, articulated by Wigmore. Under this

---

1 382 U.S. 971 (1966).

2 Schmerber v. California, 384 U.S. 757 (1966).

3 Breithaupt v. Abram, 352 U.S. 432 (1957).

4 384 U.S. 436 (1966).

5 *Id.* at 460.

6 Blood tests have been held to violate the privilege by some state courts. See, *e.g.*, State v. Lorenz, 406 P.2d 278 (Okla. Crim., 1965); Combes v. Kelly 2 Misc. 2d 491, 152 N.Y.S.2d 934 (Sup. Ct. 1956); Trammell v. State, 162 Tex. Crim. 543, 287 S.W.2d 487 (1956); *Cf.* State v. Height, 117 Iowa 650, 91 N.W. 935 (1902).

7 384 U.S. at 763n.7.

view, only evidence which invokes "the moral obligation for truthtelling" is privileged.[8] However, the Court found that determining privileged evidence by using the terms "communicative" or "testimonial" in contradistinction to "physical" or "real" was a device of limited usefulness, and declined to adopt past applications of Wigmore's formula in all instances.

This partial rejection might be taken as an indication that the Court intends to re-examine the scope of the privilege. But whatever changes the Court's reservations of the efficacy of the "testimonial" test might suggest, resolution of the issue must necessarily wait for later cases since no general principle indicating what scope the privilege will be given is enunciated in *Schmerber*. Questions such as whether an accused can be compelled to give a handwriting exemplar,[9] or to make movements,[10] or to assume positions[11] that witnesses claim to have observed during the perpetration of a crime, were avoided. Instead, the Court spoke of "communicative acts or writings"[12] or, physical evidence which evokes the "spirit and history of the fifth amendment"[13] as being within the privilege. Unfortunately, such phrases merely ask, in another way, what sort of acts, writings, or physical evidence are privileged.

Nevertheless, the Court did depart from this cautious approach long enough to specifically state that lie detector tests are within the scope of the privilege. This was apparently done to preclude the inference that results of such tests would be admitted on the theory that they can be thought of as obtaining only physical evidence.[14] The Court said that such a superficial analysis would fail, since lie detector tests compel evidence that is essentially testimonial and, therefore, invoke the "spirit and history" of the privilege.

Unlike lie detector tests, blood tests lack the essential ingredient—compelled exercise of an accused's "testimonial capacity"—necessary to bring within the privilege evidence that could be characterized as physical or real. Therefore, petitioner's privilege was not violated.

---

8 Wigmore, Evidence § 2264 (McNaughton rev. 1961).

9 Compelling an exemplar was permitted on cross examination after denial of forgery on direct in Mann v. State, 33 Ala. App. 115, 30 So.2d 462 (1947). But an exemplar compelled during interrogation was held inadmissible in Kennison v. State, 97 Tex. Crim. 154, 260 S.W. 174 (1924).

10 In Commonwealth v. Burke, 339 Mass. 521, 159 N.E.2d 856 (1959), defendant was compelled to walk away and look over his shoulder. But *cf.* Spencer v. State, 404 P.2d 46 (Okla. Crim. 1965).

11 Allowed in State v. Nelville, 175 N.C. 731, 95 S.E. 55 (1918). *Contra*, Aiken v. State, 16 Ga. App. 848, 86 S.E. 1076 (1913).

12 384 U.S. at 764.

13 *Ibid.*

14 It is doubtful that any court would hold compelled lie detector tests admissible. Under Wigmore's analysis, lie detector tests implicate the privilege. 8 Wigmore, Evidence § 2265 at (11) (McNaughton rev. 1961). Even advocates of the tests seem to admit this. See Inbau, Self-Incrimination 67 (1950). See also Herman, "The Use of Hypno-Induced Statements in Criminal Cases," 25 Ohio St. L.J. 1, 30-34 (1964).

Petitioner's right to counsel argument fared no better than his fifth amendment claim. Because his refusal to permit the blood test was made on his attorney's advice, petitioner urged that disregarding his refusal was a denial of his right to counsel. The Court rejected this, saying that if there was no right to refuse, counsel's advice did not create one. Furthermore, an accused's right to counsel applies only to help him protect bona fide rights; it does not protect rights which are erroneously thought to exist. Stated simply, one cannot lose that which he does not have.

Moving next to the search and seizure question, the Court held that petitioner's blood test was pursuant to a valid arrest. In testing the validity of the search, the Court first considered the lack of a warrant, and found that the danger of destruction of the evidence justified the arresting officer's failure to obtain one. At one time, searches pursuant to a valid arrest were permitted only if there was a search warrant, or if the lack of the warrant was justified by an emergency.[15] This was discarded,[16] and, the rule that no warrant is needed (in a search incident to a valid arrest) regardless of whether an emergency exists has since been developed.[17] This policy raised strong dissents from the outset,[18] and the fact that the Court felt it necessary, in *Schmerber*, to find an emergency before approving the lack of a warrant may suggest a return to the earlier standard.

In addition to warrants, the fourth amendment requires that searches be reasonable and made on probable cause.[19] In considering the reasonableness of taking petitioner's blood, the Court looked to the manner of taking it. They found that acceptable medical practices had been followed. It was suggested that had the test been made by police in a station house, rather than by a physician in a hospital, the search would probably have been unreasonable.[20] Probable cause for the search existed because petitioner's outward appearance of drunkenness reasonably led to the conclusion that his blood would contain alcohol. Because of the considerations of "human dignity and privacy," the Court held that intrusions into the human body required not only probable cause, but also a clear indication that the evidence sought would be obtained, an apparent strengthening of the probable cause necessary for search without a warrant.

It was not considered necessary to inquire whether blood was an item permissibly seizable under the mere evidence rule of *Gouled v. United States*.[21] That case held that seizure must be based on the power of the police to either: (1) Recover items in which the public or a complainant

---

15 Trupiano v. United States, 334 U.S. 699 (1948).

16 United States v. Rabinowitz, 339 U.S. 56 (1950).

17 Abel v. United States, 362 U.S. 217 (1960); Kremen v. United States, 353 U.S. 346 (1957).

18 United States v. Rabinowitz, 339 U.S. 56, 68 (1950) (dissenting opinion); Abel v. United States, 362 U.S. 217, 248 (1960) (dissenting opinion).

19 U.S. Const. amend. IV.

20 384 U.S. at 771-72.

21 255 U.S. 298 (1921).

has a greater right to possession than the present holder, or, (2) Take items, the possession of which, has been made illegal.[22] If a seizure cannot be justified on these grounds, but is made only to obtain evidence, it is "evidentary," and therefore, illegal.[23] By so limiting permissible seizure, the *Gouled* Court hoped to achieve one of the historic aims of the fourth amendment—limiting the general search.[24] The rule has been more specifically stated as only allowing the seizure of fruits or instrumentalities of a crime, weapons that could be used in escape, or contraband.[25] A strict application of this principle would seem to render blood tests not permissibly seizable. But the rule has been applied so as to seriously limit its effectiveness. Courts have been ingenious in finding matter to be in a permissibly seizable category,[26] and have not applied *Gouled* to tangible evidence.[27] Furthermore, though the *Gouled* decision was based on the fourth amendment, the rule has not been applied to the states.[28] In *Schmerber*, this trend toward contracting the rule was furthered by the revelation of an apparently new limitation—the rule applies only to the seizure of property. Using this test the court concluded that blood was not property, and therefore that no mere evidence question was raised. The explanation given—that *Gouled* only limits state interference with property relationships, and is not helpful in examining intrusions into the human body—is of dubious validity.[29] But accepting this, though it seems to go to the manner of the search rather than the permissibility of the seizure, one is still left wondering what blood is if it is not property.

However, *Schmerber*'s impact on the question of proper seizure will probably not come from its adding yet another obscure limitation to the mere evidence rule. Instead the case's significance in this area may be found in the Court's considering the lack of a warrant, the manner of the search, and the strength of the probable cause, which along with the continued under-

---

22 *Id.* at 309.

23 *Id.* at 310.

24 See 2 Corwin, Selected Essays on Constitutional Law 1399 (1938); 1 Cooley, Constitutional Limitations 610 (8th Edition 1927).

25 Harris v. United States, 331 U.S. 145 (1947).

26 Marron v. United States, 275 U.S. 192 (1927) (ledger used by parties operating an illegal still).

27 Olmstead v. United States, 277 U.S. 438, 464 (1928) ("seizure" of conversation by electronic device held valid).

28 Two states, California, in People v. Thayer, 63 Cal. 2d 635, 47 Cal. Rptr. 780, 408 P.2d 108 (1965), and New York, in People v. Carrol, 38 Misc. 2d 630, 238 N.Y.S.2d 640 (Sup. Ct. 1963), have recently rejected the rule despite Mapp v. Ohio, 367 U.S. 643 (1961). *But see* Hayden v. Warden, 363 F.2d 647 (4th Cir. 1966), a federal habeas corpus proceeding holding *Gouled* applicable to the states. Florida, in State v. Willard, 54 So. 2d 179 (Fla. 1951), and Wyoming, in State v. George, 32 Wyo. 223, 231 Pac. 683 (1924), have apparently adopted *Gouled* on their own. See also Comment, 27 Ohio St. L.J. 480, 492-93 (1966).

29 See Comment, 20 U. Chi. L. Rev. 319 (1953), for a discussion of the rationale of the *Gouled* case.

cutting of *Gouled*, could indicate a coming departure from the flat prohibition against evidentiary searches. *Gouled* might be too broad a protection against fourth amendment abuses. It is possible that when matter seized can be categorized as other than property or "tangible," evidentiary searches will be permitted, if conducted in a manner paying sufficient deference to human dignity and privacy, and controlled by more stringent warrants and probable cause requirements. Furthermore, the property-nonproperty distinction made by the Court could be short lived. A possible outcome is that the evidentiary search prohibition of *Gouled* will be discarded altogether, rather than further weakened, thus permitting the seizure of mere evidence in some cases. The guidelines set out in *Schmerber* to test the taking of petitioner's blood seem to be a more precise safeguard against the general search, and may govern searches in general.

CONSTITUTIONAL LAW—POLL TAX—VIOLATIVE OF EQUAL PROTECTION —*Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966)*— Virginia residents brought suits in a federal district court for the purpose of having the Virginia constitutional and statutory provisions, which required the payment of a poll tax as a prerequisite to voting, declared to be in violation of the federal constitution, and for the purpose of having their enforcement permanently enjoined. The amount of the tax in question was one dollar and fifty cents per year and a citizen must have paid the tax for the three years next preceding the year of the election in which he desired to vote, and must have paid the tax six months prior to the election in order to be eligible to vote.

The district court dismissed the complaint, feeling bound to follow *Breedlove v. Suttles*,[1] which had previously upheld the Virginia poll tax. On appeal the Supreme Court reversed, holding that a tax as a prerequisite to voting violates the equal protection clause, in that a person's ability to pay a tax has no relation to that person's qualifications as a voter.[2]

The Court had previously upheld the validity of the poll tax in both *Breedlove*[3] and in *Butler v. Thompson*,[4] but in neither case did the Court consider the issue of economic discrimination presented in *Harper*.

In *Breedlove*, the equal protection argument was based not on discrimination between rich and poor, but upon the fact that certain classes of persons were exempted from payment of the tax.[5] The Court upheld these exceptions as being reasonable. In *Butler*, an equal protection argument was not made; the attack on the tax was based on discrimination in the

1 302 U.S. 277 (1937).

2 Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

3 302 U.S. 277 (1937).

4 184 F.2d 526 (1950), *aff'd. per curiam* 341 U.S. 937 (1951).

5 Exempted from the poll tax were those over 60 or under 21, or women unless they registered.

application of the poll tax to Negroes in violation of the fifteenth amendment.[6]

Recent emphasis on the equal protection clause, in contrast to the past when it was disparagingly characterized as "the usual last resort of constitutional arguments,"[7] raises question as to the scope of that clause in the future. Though it is now generally accepted that equal protection of the laws means the protection of equal laws,[8] it is clear that all laws affect different classes of people in different ways; all laws are discriminatory or unequal in some way.[9] To do away with all discrimination is impossible, since regulatory laws are a necessity, but some, "invidious discrimination," will not be tolerated, and thus, it becomes necessary to distinguish the reasonable discrimination from that which is invidious.[10]

In *Morey v. Doud*[11] the Court summarized the test of invidious discrimination as follows:

> The equal protection clause of the fourteenth amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.[12]

While it is obvious that the fifteenth, nineteenth, and now twenty-fourth amendments set limitations on the voting qualifications a state may impose, it has been vigorously argued that the fourteenth amendment was not meant by its framers to restrict all the voting qualifications a state may set.[13] However, *Lassiter v. Northampton County Election Bd.*[14] and *Carrington v. Rash*[15] now make it clear that the fourteenth amendment does restrict the qualifications a state may set upon the voting privilege.

In *Lassiter*, the first recent case dealing with state voting requirements as violating the equal protection clause and the first case in which the Court analyzed the purpose of voter qualification, the Court upheld as valid a

---

[6] Butler v. Thompson, *supra* note 4.

[7] Buck v. Bell, 274 U.S. 200, 208 (1927).

[8] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). See also Huang-Thio, "Equal Protection and Rational Classification" 1963 Pub. L. 412.

[9] Tressman & Tenbrock, "The Equal Protection of the Laws" 37 Calif. L. Rev. 341 (1949).

[10] Skinner v. Oklahoma, 316 U.S. 535 (1942).

[11] Morey v. Doud, 354 U.S. 457 (1957).

[12] *Id.*, at 463-464.

[13] The appellee's brief dealt at great length (25 out of 44 pages) on why the fourteenth amendment does not limit the state's power to prescribe voter qualifications. See also Justice Harlan's dissent in Reynolds v. Sims, 377 U.S. 533, 589 (1964).

[14] 360 U.S. 45 (1959).

[15] 380 U.S. 89 (1965).

literacy test. The Court found a reasonable relationship between literacy and the legitimate purpose of that voting restriction: the intelligent use of the ballot.[16]

In *Carrington v. Rash*[17] the Court struck down a state voting restriction that prohibited men in the armed forces from voting. There the Court said, "The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose."[18] There the Court found no reasonable relation between the prohibition and any of the state's alleged purposes, and thus, the restrictions violated the equal protection clause.

These two recent cases adopt a standard of constitutionality based on the fourteenth amendment that requires any restriction on voting to have a reasonable relationship with a legitimate state purpose. Thus, the way is cleared for future Court determination as to what is a valid or legitimate state interest that can be achieved through the use of voter qualification. It is clear that the intelligent use of the ballot is a legitimate state purpose. Another case recently accepted as a legitimate state purpose the insurance "that the voter will become in fact a member of the community and as such have a common interest in all matters pertaining to its government."[19]

Though the result in *Harper* is not surprising in the light of the recent Voting Rights Act[20] in which Congress declared poll taxes as a prerequisite to voting in federal elections unlawful, it is of interest to note the rationale used in declaring Virginia's restriction on voting in *state* elections unconstitutional.

The Supreme Court might have struck down the poll tax, as was done in *United States v. Alabama*.[21] There, the court said, "The necessary effect of the poll tax as adopted in 1901 was to disfranchise Negro voters. . . . Such clear and intentional attempt to deny or abridge the right to vote necessarily runs afoul of the fifteenth amendment."[22] The court, in that case placed primary emphasis, however, on the unequal administration of

---

16 Lassiter v. Northampton County Election Bd., 360 U.S. 45 (1959).

17 380 U.S. 89 (1965).

18 Carrington v. Rash, *supra* note 15.

19 Dreuding v. Devlin, 234 F. Supp. 721, 724 (1964), *aff'd. per curiam*, 380 U.S. 125 (1965).

20 Voting Rights Act of 1965 § 10, 79 Stat. 437, 442-43 (1965).

> The Congress finds that the requirement of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a prerequisite to voting.

21 252 F. Supp. 95 (1966).

22 *Id.*, at 99.

the tax, but in *Harper* there was apparently no evidence of unequal administration. Had the Court then, in the absence of unequal administration, held the tax unconstitutional under the fifteenth amendment because the Negro is, in general, poorer than the Caucasian, it would also seem to follow that literacy tests would also violate the fifteenth amendment, because the illiteracy rate among Negroes is higher than among Caucasians.[23]

The Supreme Court might also have struck down the Virginia poll tax, on the grounds used in *United States v. Texas*.[24] There, the Court stated that "the poll tax as a prerequisite to voting in the State of Texas infringes on the concept of liberty as protected by the Due Process Clause and constitutes an invalid charge on the exercise of one of our most precious rights."[25] Had the Court in *Harper* based its striking down of the poll tax on the due process clause of the fourteenth amendment because it infringed on the right to vote, however, the Court would necessarily have to look at other qualifications previously held valid—literacy tests, non-convicition of a felony, and residence for a period. They, too, infringe upon one of our most precious rights—voting.

By basing its decision in *Harper* on the equal protection clause, the Court has not opened the door to an attack on all voter qualifications. In a selective process only those which do not bear a reasonable relation to a legitimate state interest will be struck down. It is evident from *Harper* and *Morey v. Doud* that the test of invidious discrimination is one of reasonableness; that is, does the discrimination bear a reasonable relation to some legitimate state purpose?

Harper makes it clear that the test of reasonableness in the context of civil liberties[26] is not the same as in the area of commercial activity;[27] the relationship between a restriction and its purpose must be closer where the restriction is on a fundamental right. This is indicated from two factors upon which the Court in *Harper* based its decision: (1) the discrimination involved the right to vote, one which is fundamental to the preservation of all other rights, and (2) the discrimination was between members of different economic classes.[28]

The State of Virginia offered four state interests served by the poll tax: the tax was (1) a source of revenue; (2) a method of keeping the rolls of registered voters up to date; (3) a test of minimum capacity for ordering one's own affairs as a qualification for participation in the ordering of the affairs of the state; and (4) evidence of a permanent interest in and

---

23 Statistical Abstract of the United States (1966) p. 116, table 159. In 1959, 7.5% of non-whites 14 and over were illiterate, while only 1.6% of whites 14 and over were illiterate.

24 252 F. Supp. 234 (1966).

25 *Id.*, at 255.

26 *Supra* note 11, and related text.

27 Metropolitan Life Ins. Co. v. Brownell, 294 U.S. 580 (1934).

28 383 U.S. 663 (1966).

attachment to the community.[29] The poll tax, however, was not a reasonable means of achieving these probably legitimate state interests. The tax brought about a discrimination between rich and poor, and "lines drawn on the basis of wealth or property like those of race are traditionally disfavored;"[30] "wealth, like race, creed or color, is not germane to one's ability to participate in the electoral process."[31]

Harper emphasizes the relative importance of voting rights and the unwillingness on the part of the court to allow a person to be deprived of that right because of his inability to pay any tax. "The degree of discriminations is irrelevant,"[32] and cases involving discrimination in a commercial context[33] are not controlling because of the nature of the right involved.

---

[29] Brief for Appellees, pp. App. A5-App. A8.

[30] 383 U.S. at 668.

[31] *Ibid.*

[32] *Ibid.*

[33] See Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959); Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955); Goesaert v. Cleasy, 335 U.S. 464 (1948); Metropolitan Life Ins. Co. v. Brownell, 294 U.S. 580 (1934).